

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

DAR No. \_\_\_\_\_  
(Appeals Court No. 2017-P-1266)

CHELSEA COLLABORATIVE, MASSVOTE,  
and RAFAEL SANCHEZ,

*Plaintiffs-Appellees,*

v.

WILLIAM FRANCIS GALVIN, as Secretary of the  
Commonwealth of Massachusetts,

*Defendant-Appellant.*

**JOINT APPLICATION FOR DIRECT APPELLATE REVIEW**

The parties to this appeal hereby jointly apply for direct appellate review in this Court pursuant to Mass. R. App. P. 11(a). The question presented in this case – whether the Commonwealth may constitutionally require by statute that voters be registered 20 days before an election in order to vote in that election – is of exceptional public importance, affecting the manner in which elections are managed in each of the Commonwealth’s cities and towns, and also directly affecting the thousands of voters who register to vote in Massachusetts every year. In addition, the question presented is one of first impression. This Court has never assessed the constitutionality of the current statutory voter registration deadline.

Accordingly, the parties respectfully request that this Court allow their application for direct appellate review.

## STATEMENT OF PRIOR PROCEEDINGS

On November 1, 2016, the plaintiffs—three individuals and two voter advocacy organizations—filed a putative class-action complaint for declaratory and injunctive relief in the Suffolk Superior Court, challenging the constitutional validity of the Commonwealth’s statutory 20-day voter registration deadline. Add. A6 (dkt. #1).<sup>1</sup> Named as defendants were the Secretary of the Commonwealth and the chief local election officials in the communities in which the individual plaintiffs live: Chelsea, Revere, and Somerville. The three local election officials were later designated nominal parties.<sup>2</sup> Add. A8 (dkt. #38).

The three individual plaintiffs sought preliminary injunctive relief allowing them to vote in the November 8, 2016, election even though they had not registered 20 days before the election. Add. A6 (dkt. #5). After a hearing on November 7, the Superior Court (Wilkins, J.) granted that request and the three individual plaintiffs were permitted to cast provisional ballots on November 8, which were later counted under the authority of a revised preliminary injunction order, agreed to by the parties. *Id.* (dkt. ## 13, 15).

The Court denied the plaintiffs’ motion for class certification, Add. A8 (dkt. #31) and ordered expedited discovery. One of the original individual named plaintiffs, Wilyeliz Nazario Leon, was permitted to withdraw from the case before her deposition took place. Add. A8 (dkt. #34). A second original individual named plaintiff, Edma Ortiz, was dismissed just before trial pursuant to the Secretary’s motion for partial summary judgment.<sup>3</sup> Following a jury-waived trial on July 5, 6, 7, and 10, 2017, the Court (Wilkins, J.) issued its Findings of Fact, Conclusions of

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<sup>1</sup> Citations to “Add. A\_\_” are to the Addendum to this application, page A\_\_.

<sup>2</sup> The three local defendants did not file notices of appeal from the Superior Court judgment.

<sup>3</sup> Ortiz was dismissed for lack of an actual controversy on the grounds that she was a specially qualified voter. *See* Add. A9-A10 (dkt. ## 43, 57); *see also* G.L. c. 50, § 1; G.L. c. 51, § 50 (definition of specially qualified voter).

Law, and Order for Judgment on July 24, 2017, declaring that the state statutes establishing the 20-day voter registration deadline are inconsistent with protections set forth in the Massachusetts Constitution. Add. A12-A104. The Court amended its order the same day to stay the order's effect pending appeal, provided that a timely notice of appeal was filed. Add. A83. This amended order was entered on the docket July 25. Add. A10 (dkt. #60). The Secretary filed a notice of appeal on July 26. *Id.* (dkt. #61).<sup>4</sup>

The Secretary's appeal was docketed in the Appeals Court on September 27, 2017. *Id.* (dkt. #67).

### STATEMENT OF FACTS

In Massachusetts, most voters must be registered to vote 20 days before an election in which they wish to vote. *See* G.L. c. 51, § 26. For the November 8, 2016, biennial statewide election, that deadline was October 19. People may register to vote in person until 8:00 p.m. on the day of the deadline, on-line until midnight on that date, or by mail if postmarked by that date.

The two institutional plaintiffs—Chelsea Collaborative, Inc. and MassVote—are organizations that participate in voter registration and voter outreach activities in Massachusetts. The one remaining individual plaintiff, Rafael Sanchez, was born in Puerto Rico in 1944 and moved to Massachusetts in 1964. He has lived in Somerville since 2005. He is legally qualified to vote in Massachusetts. In 2016, he registered to vote after the October 19 deadline, and therefore he would not have been permitted to vote in the November 8, 2016 election but for the preliminary injunction issued by the Superior Court on November 7. *See* Add. A92-A94.

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<sup>4</sup> Final judgment subsequently entered on July 27, one day after the Secretary had filed his notice of appeal. Add. A10 (dkt. #62). In an abundance of caution, the Secretary filed a second notice of appeal on September 15, appealing from the July 27 final judgment. *Id.* (dkt. #66). This notice was timely filed within the applicable 60-day appeal period. *See* Mass. R. App. P. 4(a) (60-day appeal period for non-child-welfare cases in which Commonwealth or one of its officers or agencies is a party).

Because Mr. Sanchez is now registered to vote, his claims are technically moot. Nonetheless, the parties agree, and the Superior Court held (*see* Add. A14), that the case is nonetheless justiciable because the constitutionality of the 20-day voter registration deadline is an issue capable of repetition yet evading review due to the shortness of the deadline. *See, e.g., Mendonza v. Commonwealth*, 423 Mass. 771, 777 (1996) (adjudicating technically moot case presenting questions of “importance to the administration of justice in the Commonwealth” which, because of short timeframes involved, “would almost certainly evade review in this court”).

### **ISSUE OF LAW RAISED BY THE APPEAL**

The question presented is whether the Commonwealth’s statutory requirement that voters be registered 20 days prior to an election in which they wish to vote is consistent with the Massachusetts Constitution. This is a case of first impression in the Commonwealth. This issue was raised and properly preserved before the Superior Court.

### **ARGUMENT**

The Superior Court ruled in favor of the plaintiffs, “declar[ing] that it is unconstitutional to deny an otherwise qualified voter the right to vote on the ground that the voter did not register at least twenty days before the election and that G.L. c. 51, §§ 1, 1F, 26 and 34 are unconstitutional to the extent that they require such denial.” Add. A82-A83. The Court *sua sponte* stayed the effect of its judgment “pending resolution on appeal.” Add. A83.

Appellant Secretary believes that the Superior Court’s judgment should be reversed; appellees believe it should be affirmed. Because this is a joint application, the parties do not present argument here. Rather, they join in urging this Court to allow the application for direct appellate review because of what the Superior Court described as the “important and novel

constitutional issues at stake,” Add. A81 n.18. For the reasons stated below, those issues should be resolved by this Court.

**STATEMENT OF REASONS WHY  
DIRECT APPELLATE REVIEW SHOULD BE GRANTED**

This case meets each of the three criteria for direct appellate review set forth in Mass. R. App. P. 11(a). The case presents novel questions of first impression regarding the proper standard of review for the voter registration statute, and the manner in which that standard should be applied in this case. Mass. R. App. P. 11(a)(1). It presents important and unresolved questions of law under the Massachusetts Constitution, specifically, whether the Commonwealth’s 20-day registration rule is consistent with Article IX of the Declaration of Rights and Amendment Article III. Mass. R. App. P. 11(a)(2). And the question presented is of tremendous and widespread public interest, directly affecting voters and voting officials statewide, such “that justice requires a final determination by the full Supreme Judicial Court.” Mass. R. App. P. 11(a)(3).

## CONCLUSION

For the foregoing reasons, the parties' joint application for direct appellate review should be allowed.

Respectfully submitted,

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Dated: October 2, 2017

### **CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on October 2, 2017, I served a copy of this application via this Court's e-filing system on the counsel listed below.

/s/ David C. Kravitz

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## **ADDENDUM**

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# 1684CV03354 Chelsea Collaborative et al vs. William Francis Galvin as Secretary of the Commonwealth of Massachusetts et al

<b>Case Type</b>	Equitable Remedies	<b>Initiating Action:</b>	Other Equity Action
<b>Case Status</b>	Closed	<b>Status Date:</b>	07/27/2017
<b>File Date</b>	11/01/2016	<b>Case Judge:</b>	
<b>DCM Track:</b>	F - Fast Track	<b>Next Event:</b>	

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[Party](#)
[Event](#)
[Tickler](#)
[Docket](#)
[Disposition](#)

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Date	Session	Location	Type	Event Judge	Result
11/07/2016 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Hearing for Protective Order	Wilkins, Hon. Douglas H	
01/24/2017 03:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Motion Hearing	Wilkins, Hon. Douglas H	Rescheduled
02/02/2017 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Litigation Control Conference	Wilkins, Hon. Douglas H	Rescheduled
02/09/2017 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Rule 12 Hearing	Wilkins, Hon. Douglas H	
02/09/2017 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Litigation Control Conference	Wilkins, Hon. Douglas H	
02/09/2017 03:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Rule 12 Hearing	Wilkins, Hon. Douglas H	Rescheduled
02/13/2017 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Hearing	Wilkins, Hon. Douglas H	Rescheduled
02/23/2017 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Litigation Control Conference	Wilkins, Hon. Douglas H	Held as Scheduled
06/29/2017 02:00 PM	Civil D	BOS-3rd FL, CR 314 (SC)	Final Trial Conference	Wilkins, Hon. Douglas H	Held as Scheduled
07/06/2017 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Waived Trial	Wilkins, Hon. Douglas H	Held as Scheduled
07/07/2017 09:00 AM	Civil D	BOS-3rd FL, CR 314 (SC)	Jury Waived Trial	Wilkins, Hon. Douglas H	Held as Scheduled

**Ticklers**

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	11/01/2016	01/30/2017	90	07/27/2017
Answer	11/01/2016	12/21/2016	50	07/27/2017
Rule 12/19/20 Served By	11/01/2016	01/31/2017	91	07/27/2017
Rule 12/19/20 Filed By	11/01/2016	02/10/2017	101	07/27/2017

Tickler	Start Date	Due Date	Days Due	Completed Date
Rule 12/19/20 Heard By	11/01/2016	02/10/2017	101	07/27/2017
Rule 15 Served By	11/01/2016	01/31/2017	91	07/27/2017
Rule 15 Filed By	11/01/2016	02/10/2017	101	07/27/2017
Rule 15 Heard By	11/01/2016	02/10/2017	101	07/27/2017
Discovery	11/01/2016	07/14/2017	255	07/27/2017
Rule 56 Served By	11/01/2016	08/11/2017	283	07/27/2017
Rule 56 Filed By	11/01/2016	09/18/2017	321	07/27/2017
Final Pre-Trial Conference	11/01/2016	12/29/2017	423	07/27/2017
Judgment	11/01/2016	11/01/2018	730	07/27/2017

### Docket Information

Docket Date	Docket Text	File Ref Nbr.
11/01/2016	Chelsea Collaborative, MassVOTE, Edma Ortiz, Wilyeliz N Leon, Rafael Sanchez's MOTION for appointment of Special Process Server.	3
11/01/2016	Plaintiff(s) Edma Ortiz, Wilyeliz N Leon, Rafael Sanchez's EMERGENCY Motion for a Preliminary Injunction	5
11/01/2016	Edma Ortiz, Wilyeliz N Leon, Rafael Sanchez's Memorandum in support of Emergency Motion for a Preliminary Injunction	6
11/01/2016	Case assigned to: DCM Track F - Fast Track was added on 11/01/2016	
11/01/2016	Original civil complaint filed.	1
11/01/2016	Civil action cover sheet filed n/a TRK	2
11/01/2016	Plaintiff(s) Chelsea Collaborative, MassVOTE, Edma Ortiz, Wilyeliz N Leon, Rafael Sanchez's MOTION for Short Order of Notice  Applies To: Chelsea Collaborative (Plaintiff)	4
11/04/2016	William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Memorandum in opposition to individual named Plaintiffs' emergency motion for a preliminary injunction	7
11/04/2016	Affidavit of Michelle K. Tassinari	8
11/07/2016	Short Order of Notice, returned SERVED  Applies To: William Francis Galvin as Secretary of the Commonwealth of Massachusetts (Defendant)	9
11/07/2016	Short Order of Notice, returned SERVED  Applies To: Jeannette Cintron White as City Clerk of the City of Chelsea (Defendant)	10
11/07/2016	Short Order of Notice, returned SERVED  Applies To: Diane R Colella as Election Commissioner for the City of Revere (Defendant)	11
11/07/2016	Short Order of Notice, returned SERVED  Applies To: Nicolas P Salerno as Chairman of the Somerville Election Commission (Defendant)	12
11/07/2016	Endorsement on Motion for (#5.0): ALLOWED Emergency After hearing Allowed only as to a provisional vote See order of this date	
11/07/2016	ORDER: on Motion for Preliminary Injunction (see complete order) Notice Sent	13
11/17/2016	Plaintiffs, Defendants Chelsea Collaborative, MassVOTE, Edma Ortiz, Rafael Sanchez, Wilyeliz N Leon, William Francis Galvin as Secretary of the Commonwealth of Massachusetts, Jeannette Cintron White as City Clerk of the City of Chelsea, Nicolas P Salerno as Chairman of the Somerville Election Commission's Joint Motion to modify the Court's November 7, 2016 Preliminary Injunction	14
11/21/2016	Endorsement on Motion to Modify the Court's November 7, 2016 Preliminary Injunction (#14.0): ALLOWED as Stated in the Accompanying Order (dated 11/18/16) notice sent 11/18/16	
11/21/2016	AMENDED ORDER: Order on Motion for Preliminary Injunction (see P#15 for Order) (dated 11/18/16) notice sent 11/18/16	15

Docket Date	Docket Text	File Ref Nbr.
12/15/2016	Plaintiff Chelsea Collaborative's Joint Motion for scheduling order	16
12/15/2016	Plaintiff Chelsea Collaborative's Assented to Motion for Admission Pro Hac Vice	17
12/20/2016	Plaintiff Chelsea Collaborative, Edma Ortiz, Wilyeliz N Leon, Rafael Sanchez, Rafael Sanchez's Motion for class certification (w/o opposition)	18
12/21/2016	Plaintiff Chelsea Collaborative's Joint Submission of Proposed Scheduling Order (submitted by all parties): Joint schedule APPROVED IN PART. See p. 2 of proposed order. I have struck all trial related events from the proposed schedule, as premature. Once a summary judgment decision is issued, if there remains a need for a trial the parties are invited to revisit that schedule. If no summary judgment motions are filed, the parties may also request a final pretrial conference for the setting of a trial date (dated 12/19/16) notice sent 12/2/16	19
12/23/2016	Endorsement on Motion for Admission Pro Hac Vice (#17.0): ALLOWED by Assent (dated 12/22/16) notice sent 12/23/16	
12/23/2016	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's EMERGENCY Motion for Extension of Time to File Opposition to Individual Named Plaintiffs' Motion for Class Certification: ALLOWED, only because the defendants' arguments will have to be considered at some point (dated 12/22/16) notice sent 12/23/16	20
12/23/2016	Received from Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts: Answer to original complaint;	21
12/23/2016	ORDER: Scheduling Order (see P#22) (dated 12/22/16) notice sent 12/22/16	22
12/23/2016	Endorsement on Motion for Scheduling Order (#16.0): Other action taken After hearing, see separate order (dated 12/22/16) notice sent 12/23/16	
12/23/2016	Defendant Jeannette Cintron White as City Clerk of the City of Chelsea's Motion for special motion to dismiss pursuant to MRCP 12(b)	23
12/23/2016	General correspondence regarding letter to the Court from City of Revere regarding filing of motion to Dismiss notice sent 12/23/16	24
12/27/2016	Received from Defendant Nicolas P Salerno as Chairman of the Somerville Election Commission: Answer to original complaint;	25
01/19/2017	Event Result: The following event: Motion Hearing scheduled for 01/24/2017 03:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
01/19/2017	Event Result: The following event: Litigation Control Conference scheduled for 02/02/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
01/19/2017	Plaintiff Chelsea Collaborative's Assented to Motion to Reschedule hearing: ALLOWED (filed and allowed 1/19/17) notice sent 1/19/17	26
01/20/2017	William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Memorandum in opposition to individual named Plaintiffs' motion for Class Certification	27
02/03/2017	Defendant Diane R Colella as Election Commissioner for the City of Revere's Motion to Dismiss (with opposition)	28
02/07/2017	Defendant Jeannette Cintron White as City Clerk of the City of Chelsea's Motion to dismiss all counts pursuant to MRCP 12(b) (w/opposition)	29
02/09/2017	Event Result: The following event: Rule 12 Hearing scheduled for 02/09/2017 03:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	
02/13/2017	Event Result: The following event: Hearing scheduled for 02/13/2017 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
02/23/2017	Event Result: The following event: Litigation Control Conference scheduled for 02/23/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	
03/09/2017	Plaintiff Chelsea Collaborative, MassVOTE, Edma Ortiz, Wilyeliz Nazario Leon, Rafael Sanchez's Assented to Motion to Withdraw Appearance of Attorney Nicholas S. Bradley	30



Docket Date	Docket Text	File Ref Nbr.
03/10/2017	Endorsement on Motion for Class Certification (#18.0): DENIED After hearing, denied. See Memo of this date. Dated: 3/8/17 Notice sent 3/9/17	
03/10/2017	MEMORANDUM & ORDER:  ON INDIVIDUAL NAMED PLAINTIFFS' MOTION FOR CLASS CERTIFICATION: CONCLUSION - For the above reasons, the Individual Named Plaintiffs' Motion for Class Certification is DENIED. Dated: March 8, 2017 Notice sent 3/9/17	31
03/10/2017	Party(s) file Stipulation re: discovery and proceedings.  Applies To: Chelsea Collaborative (Plaintiff); MassVOTE (Plaintiff); Leon, Wilyeliz Nazario (Plaintiff); Sanchez, Rafael (Plaintiff); Jeannette Cintron White as City Clerk of the City of Chelsea (Defendant); Diane R Colella as Election Commissioner for the City of Revere (Defendant); Nicolas P Salerno as Chairman of the Somerville Election Commission (Defendant)	32
03/16/2017	Endorsement on Motion to withdraw appearance of Attorney Nicholas S. Bradley (#30.0): ALLOWED Dated: 3/10/17 Notice sent 3/13/17	
03/23/2017	Plaintiff(s) Chelsea Collaborative Joint motion filed for protective order  Applies To: Chelsea Collaborative (Plaintiff); MassVOTE (Plaintiff); Ortiz, Edma (Plaintiff); Leon, Wilyeliz Nazario (Plaintiff); Sanchez, Rafael (Plaintiff); William Francis Galvin as Secretary of the Commonwealth of Massachusetts (Defendant); Jeannette Cintron White as City Clerk of the City of Chelsea (Defendant); Diane R Colella as Election Commissioner for the City of Revere (Defendant); Nicolas P Salerno as Chairman of the Somerville Election Commission (Defendant)	33
03/27/2017	Plaintiff Wilyeliz Nazario Leon's Assented to Motion to Voluntarily dismiss Wilyeliz Nazario Leon	34
03/27/2017	Endorsement on Motion for (#33.0): ALLOWED Stipulated Protective order Allowed by Agreement with modifications per trial Court Rule V111 Notice sent 3/30/17	
03/27/2017	ORDER: Stipulated Protective order Notice Sent 3/30/17	35
04/03/2017	Endorsement on Motion to (#34.0): ALLOWED voluntarily dismiss by agreement Notice Sent 4/3/17	
04/04/2017	Plaintiff Chelsea Collaborative's Assented to Motion to Withdraw Appearance of Attorney Sean J. Young  Applies To: Chelsea Collaborative (Plaintiff); MassVOTE (Plaintiff); Ortiz, Edma (Plaintiff); Leon, Wilyeliz Nazario (Plaintiff); Sanchez, Rafael (Plaintiff)	36
04/04/2017	Plaintiff Chelsea Collaborative, MassVOTE, Edma Ortiz, Wilyeliz Nazario Leon, Rafael Sanchez's Motion for Admission Pro Hac Vice	37
04/05/2017	Endorsement on Motion to Dismiss of Jeanette Cintron White (#29.0): DENIED After hearing, DENIED. Defendant shall be a nominal Defendant. See Memo of this date (dated 4/3/17) notice sent 5/4/17	
04/05/2017	Endorsement on Motion to Dismiss of Dianne R. Colella (#28.0): DENIED After hearing, DENIED. Defendant shall be a nominal party. See memo of this date (dated 4/3/17) notice sent 4/5/17	
04/05/2017	MEMORANDUM & ORDER:  On Defendant Diane R. Colella's Motion to Dismiss and Defendant Jeanette Cintron White's Motion to Dismiss: (1) The Defendants' Motions to Dismiss are DENIED; (2) The Municipal defendants shall be nominal parties in this case and shall have no obligation to respond to any pleading or motion, attend any hearing, or take any other action unless they choose to do so, unless otherwise ordered by the Court. Any municipal defendant shall have the option to participate in any aspect of this proceeding, if she or he chooses  (see P#38 for full order) (dated 4/3/17) notice sent 4/5/17	38
04/06/2017	Endorsement on Motion to (#36.0): ALLOWED no continuance of motion Notice Sent 4/7/17	
04/06/2017	Endorsement on Motion for (#37.0): ALLOWED admission Notice Sent 4/7/17	
05/31/2017	Plaintiff Chelsea Collaborative's Joint Motion to amend the Scheduling Order  Applies To: Chelsea Collaborative (Plaintiff); MassVOTE (Plaintiff); Ortiz, Edma (Plaintiff); Sanchez, Rafael (Plaintiff); William Francis Galvin as Secretary of the Commonwealth of Massachusetts (Defendant)	39
06/02/2017	Endorsement on Motion to amend the (#39.0): ALLOWED scheduling order as described pre trial Memo due 6/28/17 FTC remains 6/29/17 Notice sent 6/6/17	



Docket Date	Docket Text	File Ref Nbr.
06/26/2017	Defendant(s) William Francis Galvin as Secretary of the Commonwealth of Massachusetts motion filed to compel Plaintiffs MassVOTE and Chelsea Collaborative to produce proper and complete responses to requests for production of documents (w/opposition)	40
06/28/2017	William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Memorandum of Law	41
06/28/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's EMERGENCY Motion to strike and exclude plaintiffs' unauthorized sur-rebuttal expert report	42
06/28/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Motion for summary judgment, MRCP 56 as to Plaintiff Edma Ortiz	43
06/28/2017	Affidavit of Juliana deHaan Rice	44
06/28/2017	Opposition to Secretary of the commonwealth's motion for partial summary judgment (P#43) filed by Edma Ortiz	45
06/28/2017	General correspondence regarding Declaration of Jessie J. Rossman	46
06/28/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Reply to Edma Ortiz's opposition (P#45) to Secretary of the Commonwealth's motion for partial summary judgment	47
06/28/2017	Affidavit of (Second) Juliana deHaan Rice	48
06/28/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Motion in limine to preclude irrelevant testimony regarding election-day registration	49
06/28/2017	Opposition to the Secretary's motion in limine to preclude testimony regarding election day registration (P#49) filed by Chelsea Collaborative, MassVOTE, Edma Ortiz, Rafael Sanchez	50
06/28/2017	Joint Pre-Trial Memorandum filed:	51
06/28/2017	Plaintiffs Chelsea Collaborative, MassVOTE, Edma Ortiz, Rafael Sanchez's Motion in limine to exclude testimony of Ramon Trinidad (w/opposition)	52
06/28/2017	Plaintiffs Chelsea Collaborative, MassVOTE, Edma Ortiz, Rafael Sanchez's Motion in limine to exclude testimony of Andrew T. Dowd (w/opposition)	53
06/28/2017	Plaintiffs Chelsea Collaborative, Chelsea Collaborative, Edma Ortiz, Rafael Sanchez's Motion in limine to limit testimony of Charles Stewart, Ph.D, to opinions disclosed in his rebuttal report (w/opposition)	54
06/29/2017	Event Result: The following event: Final Trial Conference scheduled for 06/29/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	
06/30/2017	Endorsement on Motion to (#52.0): DENIED exclude testimony without prejudice to objections to specific questions Deft has identified findings on which the witness will testify but the Court will exclude testimony is irrelevant or creates unfair surprise	
06/30/2017	Endorsement on Motion in limine to (#53.0): ALLOWED exclude testimony After hearing allowed The state of mind of local officials is not relevant and the depts offer no trace of relevance except for theories that require accepting the local officials statements as true or factual matters such as their observed "experience" for those purposes the testimony is inadmissible heresay not within an exception See opposition Part 111 Exclusion is without prejudice to an amicus submission Notice Sent 7/3/17	
07/06/2017	Endorsement on Motion to Compel Plaintiffs MassVote and Chelsea Collaborative to Produce Proper and Complete Responses to Requests for Production of Documents (#40.0): DENIED after hearing (dated 6/30/17)	
07/06/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Motion in limine to preclude irrelevant testimony regarding Election-Day Registration After hearing Denied both sides cite the experience of other states on the question of state interest and less restrictive alternatives without thereby asking the court to make policy choices Notice sent 7/3/17 Notice sent 6/30/17 (entered 6/30/17)	55
07/06/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's EMERGENCY Motion to strike and exclude plffs un authorized sur-rebuttal expert report After review Denied Rebuttal of the defts expert report is customary probably given the June 2, submission by the deft If there is any prejudice (none yet appears) A continuance or supplemental submission is preferable to preclusion Notice sent 7/3/17 (entered 6/30/17)	56

Docket Date	Docket Text	File Ref Nbr.
07/06/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Motion for partial Summary Judgment After hearing Allowed While the depts opposition to Ms Ortiz's voting gave her standing there is no actual controversy as they now concede that 8PM not midnight is the statutory cutoff for determining absence from the Commonwelath for seven days before the registration deadline The Secretary's adoption of this construction make its unlikely that Ms Ortiz's claim now moot will repeat itself and evade review Notice sent 7/3/17 (entered 6/30/17)	57
07/06/2017	Event Result: The following event: Jury Waived Trial scheduled for 07/06/2017 09:00 AM has been resulted as follows: Result: Held as Scheduled	
07/06/2017	Endorsement on Motion to (#54.0): DENIED to limit testimony Denied without prejudice to objections to particular questions Failure to disclose in timely fashion may result in exclusion if any if any prejudice cannot be served by a continuance reimbursement of gifts etc Notice Sent 7/5/17 Notice sent 7/5/17 (entered 7/3/17)	
07/07/2017	Event Result: The following event: Jury Waived Trial scheduled for 07/07/2017 09:00 AM has been resulted as follows: Result: Held as Scheduled	
07/11/2017	Defendant William Francis Galvin as Secretary of the Commonwealth of Massachusetts's Motion for Directed Verdict: Filed and DENIED at the close of plaintiff's case without prejudice (dated 7/7/17)	58
07/13/2017	General correspondence regarding Letter to Judge Wilkins Leave is granted to file these materials as an Amicus Curiae basis Notice Sent 7/19/17	59
07/25/2017	ORDER: FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT: ORDER After trial, the COURT DECLARES THAT: 1. It is unconstitutional to deny the right to vote to a citizen who meets the qualifications of MASS. CONST. ART. III on the ground that the voter did not register at least twenty days before the election. 2. G. L. c. 51, Secs. 1, 1F, 26 and 34 are unconstitutional to the extent that their 20-day deadline operates to deny constitutionally qualified voters the right to cast a ballot. FINAL JUDGMENT SHALL ENTER, BUT SHALL BE STAYED FOR 60 DAYS AND, IF A TIMELY NOTICE OF APPEAL IS FILED, SHALL BE STAYED PENDING RESOLUTION ON APPEAL. Dated: July 24, 2017 Notice in hand 7/24/17 AG's Office Notice sent 7/25/17	60
07/26/2017	Notice of appeal filed.  Notice sent 7/27/17  Applies To: William Francis Galvin as Secretary of the Commonwealth of Massachusetts (Defendant)	61
07/27/2017	FINAL JUDGMENT The Court Declares that: 1. It is unconstitutional to deny the right to vote to a citizen who meets the qualifications of Mass Const. Art 111 on the ground that the voter did not register at least twenty days before the election 2. GL C 51 ss1 1F 26 and 34 are unconstitutional to the extent that their 20 day deadline operates to deny constitutionally qualified voters the right to cast a ballot Final Judgment shall enter but shall be stayed for 60 days and if a timely notice of appeal is filed shall be stayed pending Resolution on Appeal entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	62
07/27/2017	Disposed for statistical purposes	
07/31/2017	General correspondence regarding Notice re: Transcripts. The appellant has ordered all portions of the transcript.	63
08/03/2017	CD containing PDF Transcript of 7/5/17 7/6/17 7/7/17 & 7/10/17 received.	64
08/08/2017	List of exhibits  The Clerks's office has retained the following exhibits for Appeal. A copy of the exhibit list and of the following exhibits that were introduced into evidence in the above captioned civil case.	65
09/15/2017	Notice of appeal filed.  Notice sent 9/18/17  Applies To: William Francis Galvin as Secretary of the Commonwealth of Massachusetts (Defendant)	66
09/25/2017	Appeal: notice of assembly of record	
10/02/2017	Notice of docket entry received from Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10 (a) (3), please note that the above-referenced case (2017-P-1266) was entered in this Court on September 27, 2017.	67

### Case Disposition

Disposition	Date	Case Judge
Disposed by Court Finding	07/27/2017	

NOTICE SENT  
07.25.17  
J.D.G.  
D.E.D.  
A.L.  
C.W.F.  
T.A.T.  
D.E.H.  
R.+G.  
D.J.D.  
P.W.  
K.V.M.  
A.C.L.U.  
J.J.R.  
R.D.H.  
M.S.

In hand  
07.24.17  
AG's office  
(mo)

60

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL NO. 16-3354-D

CHELSEA COLLABORATIVE, MASSVOTE,  
EDMA ORTIZ, WILYELIZ NAZARIO LEON  
and RAFAEL SANCHEZ,  
Plaintiffs,

vs.

(LAT)  
WILLIAM F. GALVIN, as Secretary of the Commonwealth of Massachusetts,  
DIANA R. COLELLA, as Election Commissioner for the City of Revere,  
JEANNETTE CINTRON WHITE, as City Clerk of the City of Chelsea and  
NICHOLAS P. SALERNO, as Chairman of the Somerville Election Commission,  
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER FOR JUDGMENT

MASS. CONST. amend. art. III ("art. III") dictates that citizens who meet certain qualifications "shall be entitled to vote." This case challenges the Massachusetts statutes which, taken together, prohibit otherwise-qualified citizens from voting unless they register to vote at least twenty days before the election ("20-day deadline" or "registration cutoff"). G. L. c. 51, §§1, 1F, 26, 34. The 20-day deadline appears nowhere in the Massachusetts Constitution.

More than two decades of significant technological change have passed since the Legislature adopted the 20-day deadline. See St. 1996, c. 454, § 7; St. 1993, c. 475, § 6. Now, with "early voting," all registered voters may cast a ballot just 5 days after the registration cutoff. St. 2014, c. 111. By election day, the Commonwealth's voter registration data base already includes the names of thousands of late-registered voters. As a practical and technological matter, those people could vote in the ordinary course. But the 20-day deadline compels officials to use a program that actually excludes their names from the final voter printout. These and

other developments call into question any rationale for denying any qualified citizen the right to vote on account of the 20-day deadline.

After considering the facts and the law presented at trial, the Court concludes that the Legislature lacks constitutional authority to enact additional voter qualifications. The Legislature may pass laws that are necessary to ensure voters' qualifications of voters or to ensure election security and order. The evidence overwhelmingly shows no such necessity for the Massachusetts registration cutoff. Therefore, disenfranchising a qualified citizen because he or she did not register at least 20 days before the election exceeds the bounds of Legislature's authority and violates the Massachusetts Constitution. Enforcing the Constitution here is not a judicial "policy choice," as the Commonwealth contends.<sup>1</sup> Rather, the Court simply applies the basic rule of our constitutional democracy that, in cases of conflict, a statute (the 20-day deadline), must yield to the higher commands of the Massachusetts Constitution.

## **BACKGROUND**

### **I. PROCEDURAL HISTORY**

Along with the organizational plaintiffs, Chelsea Collaborative and MASSVote, Inc., three original individual plaintiffs, Edma Ortiz, Wilyeliz Nazario Leon and Rafael Sanchez ("plaintiffs") brought this action against the Secretary of the Commonwealth ("Secretary") and the Cities of Chelsea, Revere and Somerville ("Municipal Defendants") for declaratory relief on November 1, 2016. The complaint sought a preliminary injunction allowing the three individual plaintiffs to vote in the November, 2016 election.

After hearing on November 7, 2016, the Court issued a preliminary injunction ordering the municipal defendants to accept provisional ballots from the individual plaintiffs. On

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<sup>1</sup> See, e.g. Secretary of the Commonwealth's Memorandum of Law (June 28, 2017) at 15.

November 17, 2016, the parties filed a Joint Motion to Modify the Court's November 7, 2016 Preliminary Injunction, which the Court allowed in an order requiring the local election official defendants to count the individual plaintiffs' provisional ballots. Later, by agreement, former plaintiff Wilyeliz Nazario Leon was dismissed voluntarily from this case. Shortly before trial, former plaintiff Edma Ortiz was dismissed from the case for lack of an actual controversy, because it turned out that, although the local election officials believed her ineligible, she was actually a specially qualified voter. Because her plane to Logan International Airport on October 19, 2016 was delayed for some hours in landing, she was absent from Massachusetts for more than 7 days prior to 8:00 p.m. on October 19. No one picked up on this arcane aspect of the law until after the election.

Although the 2016 election has passed, the parties and Court all agree an exception to the mootness doctrine applies, because the complaint raises issues that are capable of repetition but will evade review. See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 774-775 (1978) (passage of the 1976 election did not preclude resolution of elections dispute thereafter). See generally Blake v. Massachusetts Parole Board, 369 Mass. 701, 708 (1976).

The Court recognized that the pendency of this case, and the precedent of preliminary injunctive relief in 2016, might cause complications in the 2018 elections cycle unless the Legislature or Supreme Judicial Court definitively resolves the issues soon. Therefore, the Court ordered expedited pretrial proceedings and an early trial date of July 5, 2017. See Mass. R. Civ. P. 57 (the "court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."). The parties submitted trial briefs at the final pretrial conference on June 28, 2017. See Plaintiffs' Pre-trial Memorandum of Law and Proposed Conclusions of Law ("Pl. Mem."); Secretary of the Commonwealth's Memorandum of Law ("Comm. Mem."). During and after the trial, the parties submitted additional written legal arguments. Secretary of

the Commonwealth's Supplemental Memorandum of Law, dated July 10, 2017 ("Comm. Supp. Mem."); Letter dated July 10, 2017 from plaintiffs' counsel addressing the Kinneen case; and the Plaintiffs' Post-trial Letter dated July 17, 2017.

The Court conducted the trial without a jury on July 5, 6, 7 and 10, 2017. It received and accepted an amicus submission from the Massachusetts Town Clerks' Association on July 13, 2017 and supplemental filings, including motions to strike trial testimony, on July 17, 2017.

## **II. UNDISPUTED FACTS**

The Court accepts and finds the following facts (and the facts concerning the parties set forth in Appendix C), which are established beyond any substantial dispute by the parties' pretrial filings, with minor modifications by the Court (reflected in language included in brackets below) resolving some minor disputes. For this purpose, the Court has treated as undisputed all proposed facts that a party disputed as to relevance only, after overruling the relevance objections. In any event, after hearing the evidence, the Court finds as fact all those proposed facts set forth below that were disputed only as to relevance.

The paragraph numbers in this section of the Court's memorandum are non-sequential, because this Memorandum retains the original numbering of the parties' submission and omits the proposed facts that are disputed.

### **A. Plaintiffs' Undisputed Facts**

#### **i. Voter Registration in Massachusetts**

6. Eligible Massachusetts citizens may register to vote by (a) mailing or hand-delivering a voter registration affidavit to local election officials,<sup>2</sup> (b) submitting a voter registration affidavit in

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<sup>2</sup> As used in the parties' stipulation, "local election officials" encompasses any city or town election official, registrar, clerk, or other employee who is in charge of processing voter registrations and managing Election Day operations in Massachusetts.

person at a voter registration agency, (c) in person at the Registry of Motor Vehicles ("RMV"), (d) online through the RMV, or (e) by submitting the voter registration affidavit online through the Secretary of the Commonwealth's website. 950 CMR 57.04 – 57.07.

7. Massachusetts does not permit its citizens to register (or re-register) to vote on Election Day and then cast a ballot based on that newly submitted registration information on the same day. 950 CMR 57.04 – 57.07.

9. Upon successfully registering, a citizen is added to the annual register of voters in his or her city or town. G. L. c. 51 § 46.

12. Local election officials are responsible for processing voter registration applications. 950 CMR 58.01.

13. Massachusetts uses a computer database to maintain and track voter registration information. This system is known as the Voter Registration Information System ("VRIS").

14. The office of the Secretary of the Commonwealth ("Secretary") maintains VRIS and provides technical support for its use.

16. VRIS serves several functions. [Among other things,] VRIS is used to input, store, and look up voter information; to send "queues" of electronic voter registration applications from the Secretary of the Commonwealth ("Secretary") to each city or town for processing; to print voter lists for early voting, primaries, and elections; to notate early voters and absentee voters ahead of an election day; to send certified election results to the Secretary; and to store information sourced from Annual Street Listings.

**ii. Mail-In Registration or In-Person at the Local Election Office**

17. The forms used for voter registrations mailed to a local election official and the forms used for in-person registrations at a local election official's office are substantively the same.



18. Upon receiving an in-person or mail-in registration form, a local election official typically time-stamps the form.

**iii. In-Person Registration at a Voter Registration Agency or at the Registry of Motor Vehicles**

20. Massachusetts citizens seeking to register to vote (“applicants”) may complete voter registration affidavits at a voter registration agency, such as military recruitment offices or state agencies that provide public assistance or assistance to people with disabilities (e.g., Department of Transitional Assistance, Department of Mental Health, and Department of Developmental Services). 950 CMR 57.05(3)(a).

22. The effective date of an in-person registration at a voter registration agency is the day that an individual completes the signed affidavit of registration at the agency. 950 CMR 57.05(4)(f).

23. Applicants may also complete voter registration affidavits at the RMV. 950 CMR 57.06.

25. The effective date of a registration submitted in-person at the RMV is the time a signed affidavit of registration is completed at the RMV. 950 CMR 57.06(4)(f).

**iv. Online Voter Registration**

26. Online voter registration was enacted in the Commonwealth in 2014 and implemented in 2015.

27. Since 2015, voters who have a RMV ID, such as a driver’s license, may register to vote online by completing an online affidavit of registration available at the Secretary’s website.

29. To [apply to] register online through the Secretary’s website, a registrant must enter her driver’s license or state ID number, first and last name, and date of birth. This information is verified electronically and matched with a signature on file with the RMV before the voter is given access to the online voter registration form. If no match is found in the online system, the applicant must print, sign, and deliver the application to the local election official in order to

complete the registration process. The online voting registration form has fields for mailing address, residential address, political party affiliation, telephone number, and the last address where the registrant was registered to vote.

30. Following a match between an online registrant's information and a signature on file and completion of the online form, the online voter registration system electronically transmits the online registration to the appropriate local election official's as an entry in the "pending for certification" queue within VRIS. G. L. c. 51, § 33A.

31. Applicants may also complete online voter registration applications during an online transaction with the RMV. 950 CMR 57.07. For online applications, the RMV must electronically transmit the voter registration application [information] to the Secretary's central voter registry within five days. 950 CMR 57.07(3). These applications then follow the same steps as online registrations through the Secretary's website, and are electronically transmitted to the local election official via VRIS. 950 CRM 57.07(3).

32. An online registration is effective as of the time it is completed. 950 CMR 57.07(4)(f).

**v. Local Election Officials' Responsibilities in Processing Registration Applications**

33. Upon receipt of an application for registration, local election officials check the application for completeness.

35. The mail-in voter registration form produced by the Secretary contains 14 sequentially numbered fields, but not all of the numbered fields are necessary for the application to be deemed complete. The following fields are not necessary for the application to be deemed complete: 3 ("former name"); 5 ("address where you receive all your mail"); 8 ("telephone"); 9 ("Party enrollment or designation"); 10 ("address at which you were last registered to vote"); and 13 ("Today's date"). Fields 11 (name of person assisting if applicant cannot sign) and 14

(signature) are mutually exclusive alternatives, and only one must be completed. Field 12 is the text of an affirmation; the applicant does not do anything inside field 12.

37. For online registrations, a local election official does not manually type voter registration information into VRIS. Instead, the local election official processes records transmitted to the official appearing in the VRIS “pending for certification” queue by confirming that the information is in the correct format and selecting a button in VRIS to certify the voter. The local election official can correct information submitted online, such as the format of the registrant’s address. Certifying the voter results in the registrant moving from the pending queue to the “actual registered voter” category.

40. After processing a registration, a local election official must then send an acknowledgment notice to the registrant that certifies receipt of the completed affidavit and notifies the applicant of the disposition of the affidavit. 950 CMR 57.04(3)(j), 57.05(4)(b), 57.06(4)(b), 57.07(4)(b).

41. If the voter registration affidavit is incomplete or otherwise deficient, the local election officials must notify the applicant orally or in writing and provide the applicant an opportunity to remedy the defect. 950 CMR 57.04(3)(d).

**vi. Massachusetts Early Voting Law**

44. In Massachusetts, early voting was [enacted by St. 2014, c. 111 and] implemented for the first time during the November 2016 [statewide biennial] election.

45. Under the early voting law, qualified voters who registered to vote before the [20-day deadline] are permitted to vote before Election Day, either in person or by mail in the city or town in which they are registered to vote. . . . [T]here is no numerical cap on the number of voters who may vote early in any given election.

46. Early voting begins 11 business days before a biennial election and ends at the close of business on the business day preceding the business day before the election. 950 CMR 47.03.

For the November 2016 election, early voting began on October 24, 2016, five days after the statutory voter registration deadline of October 19, 2016.

47. ... The last day of early voting for the November 8, 2016 election was Friday, November 4, 2016.

48. By statute, each city or town must establish at least one early voting site, which must include the city or town election office unless the office is unavailable or unsuitable. G. L. c. 54, § 25B. Early voting must be conducted during regular business hours throughout the early voting period.

49. In addition to the statutorily mandated locations and periods, for the November 2016 election, Boston, Lowell, and Brockton offered multiple early voting locations or extended hours on nights or weekends.

50. Within a city or town, each early voting site is required to have a voter list that includes all registered voters in that city or town.

51. The early voting list may be a printed list, the list already maintained in VRIS, or another electronic list, such as an electronic poll book.

52. Electronic poll books, also known as "poll pads," were used by 29 cities and towns during the 2016 early voting period and received positive feedback.

53. Somerville and Revere successfully printed their respective early voter lists in advance of the early voting period.

55. In Boston, 400 voters voted provisionally during the early voting period for the November 2016 election.

57. For the November 2016 election, Chelsea held early voting inside the Chelsea city clerk's office and used VRIS computers to track early voters. Somerville borrowed additional VRIS terminals from the Commonwealth and set them up in the Somerville City Hall so that they

could immediately note each voter's use of early voting in VRIS. Revere scanned records from its early voting list into the VRIS system.

59. In . . . Somerville, 40,874 people voted in the November 8, 2016 election, 40 percent of whom did so through early voting.

60. In the City of Revere, 20,081 people voted in the November 8, 2016 election, 20 percent of whom did so through early voting.

61. In the City of Chelsea, 10,033 people voted in the November 8, 2016 election, 16 percent of whom did so through early voting.

62. In the City of Boston, 277,366 people voted in the November 8, 2016 election, 18 percent of whom did so through early voting.

63. In addition to processing voter registrations, local election officials [perform] Election Day operations within their respective municipalities.

**vii. Election Day Responsibilities Of Local Election Officials**

64. To prepare for Election Day, local election officials must print a voting list with all registered voters in their respective towns and cities.

67. Somerville, Revere, and Chelsea were each able to prepare and print the Election Day voter list after the end of early voting on Friday, November 4, 2016, and before the general election on Tuesday, November 8.

68. At 7:56 pm on Monday, November 7, 2016, the Secretary's Office emailed local election officials reminding them that they should not wait until the morning of Election Day—the next day—to generate their voter lists.

69. In 2016, local election officials in Chelsea, Revere, and Somerville printed their respective voting lists using printers in their offices, without the use of outside vendors or specialized equipment.

**viii. Massachusetts Registration Deadline**

77. Thousands of Massachusetts citizens registered to vote after the registration deadline but before each of the last three presidential elections. The chart below lists the number of voters who registered to vote in the twenty days before the November 2016, 2012, and 2008 elections.

Year	Boston	Chelsea	Revere	Somerville	STATEWIDE
2016	1,562	Over 100	138	146	<b>5,567</b>
2012	1,629	59	109	Unknown	<b>7,606</b>
2008	2,393	19	22	Unknown	<b>7,308</b>

79. A “Specially Qualified Voter” is a person (a) who is otherwise eligible to register as a voter; and (b) (1) whose present domicile is outside the United States and whose last domicile in the United States was Massachusetts; or (2) whose present domicile is Massachusetts and who is: (i) absent from the city or town of residence in the active service of the armed forces or in the merchant marine of the United States, or a spouse or dependent of such person; (ii) absent from the commonwealth; or (iii) confined in a correctional facility or a jail, except if by reason of a felony conviction. G. L. c. 50 § 1.

80. The legislature first defined the term Specially Qualified Voter by a statute approved on January 14, 1994. 1993 Mass. Legis. Serv. Ch. 475 (S.B. 1824). In 2001, the legislature modified the definition of Specially Qualified Voter to exclude persons who were confined in a jail “by reason of a felony conviction.” 2001 Mass. Legis. Serv. Ch. 2883 (H.B. 2883).

81. A person who meets the definition of Specially Qualified Voter throughout the seven days immediately preceding the Voter Cutoff Law’s deadline may register after that deadline. To do

so, such a voter may appear before a local election official in the city or town of her legal residence during regular business hours up until the 4 p.m. the day before the election. There is no numerical cap on the number of voters who may qualify as a Specially Qualified Voter. G. L. c. 51, § 50.

82. For the November 2016 election, a Specially Qualified Voter could register during regular business hours from Thursday, October 20, 2016 until 4 p.m. on Monday, November 7, 2016. G. L. c. 51, § 50.

88. For the November 2016 election, there were 47 Specially Qualified Voters in Somerville.

89. In Somerville, the processing of the Specially Qualified Voters was smooth for the November 2016 election.

91. There were 13, 50, and 35 Specially Qualified Voters in Revere for the November 2016, 2012, and 2008 elections, respectively. Chelsea had no Specially Qualified Voters in those elections.

92. Boston had 986 Specially Qualified Voters who participated in the November 2016 election.

#### **ix. Election Day Registration**

196. Election Day Registration (“EDR”) is a system that allows qualified citizens to register, or re-register, to vote on Election Day and then cast a ballot based on that newly submitted registration information on the same day.

197. Sixteen states and the District of Columbia have enacted some form of EDR. Cal. Elec. Code § 2170; Colo. Rev. Stat. § 1-2-217.7; Conn. Gen. Stat. § 9-19j; D.C. Code § 1-1001.07(g)(5); H.B. 2590, 27th Leg. (Haw. 2014) (taking effect in 2018); Idaho Code Ann. § 34-408A; 10 Ill. Comp. Stat. Ann. 5/4-50, 5/5-50, 5/6-50; Iowa Code § 48A.7A; Me. Rev. Stat. Ann. tit. 21-A, § 122(4); Md. Code Ann., Elec. Law § 3-305 (2016) (allowing same-day registration during early voting); Minn. Stat. § 201.061 (Subd. 3); Mont. Code Ann. § 13-2-

304(1)(a); N.C. Gen. Stat. §§ 163-82.6A(a), 163-227.2(b) (allowing same-day registration during one-stop voting period); N.H. Rev. Stat. Ann. § 654:7-a; Vt. Stat. Ann. tit. 17, § 2144; Wisc. Stat. § 6.55; Wyo. Stat. Ann. § 22-3-104; see also Utah Code Ann. § 20A-4-108 (pilot program that continued through 2016).

**a. Dr. Barry Burden**

*Impact of EDR on Voter Registration and Voter Turnout*

202. After conducting an independent review of the peer-reviewed scholarship on EDR, Dr. Burden finds that studies have shown that EDR increases voter turnout by between three and six percentage points.

210. In order to analyze the effect that EDR would have on voter turnout in Massachusetts and which groups would benefit from EDR, Dr. Burden ran a cross-sectional regression analysis.

211. Dr. Burden determined that a cross-sectional regression analysis on 2012 voter data would be an appropriate model for this analysis.

214. The Census Bureau conducts a survey of individuals and collects data as part of its Current Population Survey (CPS). Every two years the CPS asks individuals if they voted, and, if they did not vote, why not.

218. A well designed election day registration law is good public policy.

*Administration of EDR*

221. The first adopters of EDR were able to administer EDR at the polling place using paper registrations and poll books. Some states today continue to administer their EDR process by paper.

**b. Wisconsin**

227. Milwaukee is a large urban municipality in Wisconsin. Milwaukee is demographically similar to Boston.



228. Neil Albrecht is the Executive Director of the Election Commission for the City of Milwaukee in Wisconsin. Albrecht's responsibilities in this position are to oversee all aspects of election management and coordination in Milwaukee. Albrecht has worked at the Election Commission for the City of Milwaukee for twelve years.

229. Like elections in Massachusetts, elections in Wisconsin are administered at the local, municipal level rather than at the county level.

230. As in Massachusetts, eligible citizens in Milwaukee may register to vote in several ways. In Milwaukee, voters may register by mail, online, in-person at the Milwaukee Electoral Commission, in-person at municipal libraries, or in-person at the polls on Election Day. Registration online and at municipal libraries closes 20 days prior to each election in Milwaukee (or the third Wednesday before each election). Voters may still register to vote at the Milwaukee Election Commission up until the Friday before each election, or at a polling location on Election Day.

231. Wisconsin has had EDR since 1975. Wisc. Stat. § 6.55.

232. On Election Day, voters in Milwaukee who wish to register to vote using Election Day Registration appear at their local polling place. An election official confirms that they are registering at the correct place, and then confirms that the person possesses the necessary qualifications and documentation to vote, including identification and proof of residence. The voter then completes a same-day registration form in paper, and they are then permitted to vote. After the election, a local election official enters the registration information into a statewide computer system called WisVOTE. The Milwaukee Election Commission's voter registration staff and temporary staff enter registrations into WisVOTE.

233. Voters who are unable to provide sufficient photo ID at the time they are voting, or whose registration information is incomplete at the time of registration, are issued a provisional ballot.

Provisional ballots are noted in WisVOTE and held until the Friday following the election, by which time the voter must provide the missing identification or information for their vote to be counted.

234. Wisconsin law requires that all Election Day registrations be entered into WisVOTE no later than thirty days after a primary, spring, or special elections, and no later than forty-five days after a general election.

235. Milwaukee keeps a log of every Election Day registration using a supplemental form, which is used to cross-check that every Election Day registration form has been received and properly entered into WisVOTE. The city has entered Election Day registrations within the forty-five days following a general election for at least the past eleven years.

236. WisVOTE was adopted in 2016. Prior to WisVOTE, Wisconsin used a similar database known as the Statewide Voter Registration System. WisVOTE is used to manage voter registrations and track voter participation in elections. Registrations that are mailed into the City of Milwaukee are also entered into WisVOTE.

237. Employees of the Election Commission for the City of Milwaukee are able to process same day registration voter forms in two to four minutes each.

238. During the 2014 midterm elections, approximately 45,000 voters in Milwaukee filled out a registration form on Election Day.

239. In the November 2016 election, over 247,000 people voted in Milwaukee. For each of the past three biennial elections (November 2016, November 2014, and November 2012), about 20% of voters in the City of Milwaukee registered on Election Day.

240. In Milwaukee, EDR has expanded voter participation and reduced confusion regarding the registration process.

241. Approximately 330,000 residents are registered voters in Milwaukee, and a typical turnout for a presidential election is 85% of registered voters.

242. EDR also offers voters inspired to vote close to an election the opportunity to do so.

243. In Milwaukee, voters from precincts with high student populations, high minority populations, and high concentrations of poverty are more likely to use EDR.

244. EDR is an effective mechanism for furthering the goals of the Elections Commission for the City of Milwaukee, namely the provision of fair, accurate, and accessible elections.

245. EDR increases access to voting and thus substantially increases voter participation.

Wisconsin is among the states with the highest voter participation rates in presidential elections. EDR reduces the use of provisional ballots, which introduce inefficiency and further burdens on voters and poll workers.

246. The Milwaukee Election Commission is able to implement EDR and at the same time undertake its other election duties such as voter registration, campaign finance reporting, filing requirements for political candidates, and absentee and mail-in ballot administration with a staff of eight employees.

247. A total of 654 poll books are printed in Milwaukee. Electronic poll books are not used in the City of Milwaukee. In Milwaukee, books are generally printed within days after workers finish entering mail-in registrations into WisVOTE.

**c. Massachusetts**

248. The Secretary has conducted no formal study and has issued no findings as to the burden of implementing or administering EDR in Massachusetts. ...

250. Before the Massachusetts legislature adopted the current Early Voting law, the Secretary's Office proposed a bill that would have permitted "advanced voting." This bill would have

required advanced voting to be held on the same day as the voter registration deadline, namely twenty days before the election.

251. Section 16B of Chapter 111 of the Acts of 2014 (An Act Relative to Election Laws) (May 22, 2014) ordered the creation of an elections task force, that was required by statute to study a variety of election issues, including same day registration. The Secretary or a designee is designated to sit on this task force. The statute requires the “task force [to] submit its report and recommendations, together with drafts of legislation to carry its recommendations into effect, with the clerks of the house and senate on or before August 1, 2017.” *Id.*

252. As of April 5, 2017, this task force had not yet convened an initial meeting.

**B. The Secretary’s Undisputed Proposed Findings of Fact**

**i. Elections in Massachusetts**

256. In addition to providing training and guidance to local elections officials on matters of election administration, the Elections Division in the Office of the Secretary of the Commonwealth prepares, prints, and delivers early voting ballots, absentee ballots, official ballots and envelopes for each of these. For the 2016 statewide election, over 500 unique forms of ballots were prepared.

257. The Elections Division ensures that local elections officials have properly tested their voting equipment and that the polling places are accessible.

258. There are 2174 precincts in Massachusetts. In 2016, there were 1316 unique polling places.

259. Local election officials are responsible for processing voter registrations.

260. Following the processing of a mail-in voter registration, local election officials mail an acknowledgment form to the voter. If that acknowledgment form is returned as undeliverable,

the local election official moves the voter to the “inactive voters” list and sends a confirmation of that change.

261. A voter on the inactive voters list may appear at a polling place and vote upon showing identification.

264. Local election officials are responsible for preparing voters list, consisting of every registered voter in the city or town organized by address [except that the voter lists used on election day does not include voters who registered after the [20-day deadline] and do not necessarily include Specially Qualified Voters].

266. For election-day voting in the 2016 statewide election, voter lists were required to be on paper. Electronic poll books containing the same information will be permissible for use in future elections, if approved by the Secretary of the Commonwealth.

267. Electronic poll books were permitted for use in early voting in 2016.

268. Local election officials are responsible for hiring and training poll workers for elections.

269. Local election officials are responsible for ensuring that police officers or constables are present at polling places during elections on Election Day.

270. Massachusetts is subject to the requirements of the 1993 National Voter Registration Act (NVRA).

271. Under the NVRA, the Registry of Motor Vehicles and offices that provide public assistance or assistance or services to persons with disabilities must offer residents the opportunity to register to vote, assist them in completing the voter registration form, and collect and transmit those registrations to the appropriate local election officials.

272. In Massachusetts, “registration agencies” subject to NVRA requirements are: armed services recruitment centers, the Elections Division of the Office of the Secretary of the Commonwealth, the Southeastern Division of the Office of the Secretary of the Commonwealth,

the Western Division of the Office of the Secretary of the Commonwealth, city and town clerks, local election commissions and boards of registrars, Department of Transitional Assistance, WIC, Department of Mental Health, Department of Developmental Services, Commission for the Blind, Commission for the Deaf and Hard of Hearing, Health Care Connector, Massachusetts Rehabilitation Commission, and disability offices at public institutions of higher learning. 950 CMR 57.02.

273. Local election officials are responsible for testing and examining voting equipment before elections.

274. Local election officials are responsible for counting and tabulating ballots and certifying election results.

275. Massachusetts has a Voter Registration Information System (VRIS), maintained by the Office of the Secretary of the Commonwealth.

276. VRIS is a database of registered voters as entered and updated by local elections officials.

277. VRIS was first created in 1994 and has been subsequently modified to add functionality to comply with new laws and procedures.

282. The United States Department of Homeland Security has designated elections systems as critical infrastructure.

285. Massachusetts residents can register to vote in person at any local election official's office, by mail, or on-line.

286. Voter registration forms are . . . available at municipal offices, post offices, libraries, and on-line. Voter registration forms are provided to organizations conducting voter registration drives, including MassVote and Chelsea Collaborative.

287. All voter registration forms contain information on the voter registration deadline.

288. Beginning on September 6, 2016, the Secretary's Office ran a public service announcement on various television stations providing information on voter registration and the October 19 voter registration deadline.

289. On September 26, 2016, the Secretary's Office issued a press release regarding the October 19 voter registration deadline.

290. The Secretary's Office is required to prepare and send an "Information for Voters" booklet to every Massachusetts household.

291. The Secretary's Office includes voter registration information in the booklet as well as prominent text about the deadline to register to vote.

292. The 2016 booklet represented information about the voter registration deadline in text and as well as graphically, through the inclusion of a calendar image with October 19 highlighted.

293. The 2016 booklet referenced the voter registration deadline 14 times and included information on how to register in person, by mail, or on-line.

294. The English-language version of the 2016 booklet included highlighted Spanish and Chinese text just inside the cover, informing recipients of the 1-800 number they could use to call the Secretary's Office to request a booklet in Spanish or Chinese.

295. If a Spanish-speaking or Chinese-speaking person calls the 1-800-462-VOTE (8683) number printed on the inside of the booklet, that person will be directed to a bilingual staffer in the Secretary's Office.

296. The 2016 booklet included a voter registration mail-in card, as well as information on how to obtain additional voter registration cards on the Secretary's website or by calling the Secretary's Office.

297. Beginning the week of September 19, 2016, the 2016 booklet was mailed to all residential addresses in Massachusetts using addresses provided by the United States Postal Service.

298. The Secretary's Office also arranged for delivery of the 2016 booklet to group homes, city and town halls, public libraries, senior centers, and councils on aging.

299. The Information for Voters guide was also printed in Spanish and Chinese and distributed to Spanish and Chinese organizations. These guides contained voter registration cards printed in the same language as the booklet.

300. Five hundred copies of the 2016 Spanish-language booklet were delivered to Chelsea Collaborative on October 6.

301. Versions of the booklet were produced in large-print, Braille, and audio formats and distributed to the Perkins library and the Massachusetts Commission for the Blind.

302. All versions of the Information for Voters booklet—English, Spanish, Chinese, large-print, audio, and an accessible HTML version—are available on the Secretary's website and have been so since September 21, 2016.

303. Voter registration forms in English, Spanish, and Chinese may be downloaded from the Secretary's website.

304. Massachusetts saw 168,262 new voter registrations between August 18 and October 19, 2016. ...

305. Massachusetts registered voters who move to a different city or town within Massachusetts in the six months prior to a statewide election may vote at their previous polling place. G.L. c. 51, § 1.

306. Early voting was offered for the first time in Massachusetts for the November 8, 2016, election.

307. For the 2016 statewide election, the Elections Division encouraged cities and towns to offer early voting on weekends during the early voting period in order to provide improved access for voters.



308. Early voting ballots are counted on Election Day.

309. Ramon Trinidad is an Elections Specialist in the Elections Division in the Office of the Secretary of the Commonwealth.

310. For the 2016 statewide election, Mr. Trinidad was the point person for communicating with local elections officials across the Commonwealth concerning early voting.

311. For the 2016 statewide election, every city and town had to formulate a plan as to how it would implement early voting. Each plan had to include the days and hours that the city or town would be open for early voting, where early voting would take place, whether the city or town would offer only one location or multiple locations, who would staff the early voting locations, and whether the early voting ballots would be tabulated at a central tabulation facility or at individual polling locations.

312. Mr. Trinidad coordinated a survey of local election officials in the summer of 2016 concerning their early voting plans. He then followed up with local election officials regarding their plans, answered questions about all aspects of early voting implementation, and offered suggestions to communities based on their size and resources available. Mr. Trinidad encouraged local elections officials to offer early voting on weekends and coordinated a grant that helped defray the cost of conducting early voting during weekend hours.

313. For the 2016 statewide election, Mr. Trinidad also conducted trainings for local election officials about early voting, drafted training materials, helped arrange for the Secretary's office to lease electronic poll books that city and towns could use for early voting, and made sure that each community had sufficient ballots and envelopes for the full early voting period.

314. Prior to and during the early voting period, Mr. Trinidad helped respond to inquiries to the Secretary's office from the public and from local election officials regarding early voting. Many of these inquiries pertained to voters who had updated the address where they were registered to

vote shortly before the voter registration deadline; these individuals would then attempt to vote early in the town where they had recently registered, only to discover that they were not on the town's early voting list because their updated voter registration had not yet been processed. These individual would then have to return to the town where they were previously registered in order to vote early.

316. Currently under consideration by the Massachusetts Legislature are bills that would establish Automatic Voter Registration and bills that would establish Election Day Registration in Massachusetts.

**ii. Local Election Administration**

**a. The Somerville Election Department**

317. There are three part-time Election Commissioners in Somerville, in addition to Salerno, who works full-time.

318. The Somerville Elections Department sees a large influx of voter registrations in presidential election years.

322. In Somerville, as elsewhere, mail-in voter registration forms are time-stamped when they arrive at the Elections Department.

323. Salerno sometimes time-stamps voter registration forms when they arrive at the Elections Department, but he does not process them and enter them into VRIS. This task is performed by the other three full-time employees in the office: the Deputy Election Commissioner, the Assistant Deputy Election Commissioner, and a Senior Clerk.

324. There are five computers in the Somerville Elections Department office with access to VRIS.

325. For the 2016 election, if a voter registration form arrived at the office that was postmarked after the voter registration deadline, the Elections Department time-stamped it and set it aside to be processed after election day.

327. Organizations in Somerville occasionally conduct voter registration drives aimed at encouraging students to register to vote. Sometimes these groups deliver a “big, thick stack” of 90 to 100 registration forms very close to the voter registration deadline, particularly in presidential election years.

328. The annual budget for Somerville Election Department is approximately \$400,000.

329. There are 21 polling locations in Somerville.

330. Opening all 21 precinct locations on election day costs \$65,000. This cost includes staffing, renting certain locations that are not city-owned, and paying for technical support, ballots, signage, supplies, and other incidentals.

331. Early voting in Somerville cost the city almost \$40,000 to operate. This cost included hiring poll workers and police, Elections Department staff hours, printing and advertising expenses, the wiring for the VRIS computers, and some additional equipment.

332. The three Elections Department staff members are all entitled to overtime pay for time worked outside of normal working hours.

**b. Election Day in Somerville**

333. Salerno, the three part-time Election Commissioners, and the three full-time Elections Department staff all work the full day on election day.

335. Somerville requested and received permission from the state to tabulate the early voting ballots at a central tabulation location on election day.

336. It took from 7:00 a.m. to 7:00 p.m. on November 8, 2016, to unpack and tabulate all of the early voting ballots cast in Somerville. One of the Election Commissioners oversaw this

process. The process included reading the voter's name and address from the sealed envelope containing the ballot, opening the sealed envelope, removing the ballot, and inserting it into the tabulator.

337. Somerville's 21 polling locations are not equipped with VRIS computers on election day. Instead, poll workers use cell phones or two-way radios to communicate with Elections Department staff if the poll workers have questions regarding the voter registration information of specific individuals who would like to vote but are not on the voter list.

**c. Tasks Leading up to Election Day in Somerville**

340. Sometimes poll workers cancel shortly before election day, and the Elections Department must find people to fill in to ensure that all poll worker positions are covered.

342. Somerville has 25 tabulator machines that are used to tabulate votes on election day. It also has approximately 23 AutoMARK machines that help people with disabilities to vote independently. And it has a machine that totals the results from each tabulator. Each of these machines must be tested prior to election day.

343. Testing Somerville's 25 tabulators takes at least three full days. This process includes creating 52 mock ballots for each of the three ballot styles, including two that are filled out incorrectly, feeding the ballots through the tabulator, and making sure that the tabulator correctly tabulated 50 ballots. This process is repeated with the ballots oriented in four different directions, so that each machine is tested more than 200 times.

**d. Early Voting in Somerville**

345. All voter registration forms submitted in Somerville by the voter registration deadline were processed prior to the start of early voting in October 2016. Accomplishing this task required the Elections Department staff to work extra hours.

372. ... Somerville advertise[d] the voter registration deadline in local newspapers. Salerno also encourages voter registration in Somerville by posting on social media, tabling at events, and visiting local organizations and universities to encourage young people and students to register.

346. The Somerville Elections Department conducted early voting at the Somerville City Hall Aldermanic Chambers.

348. Somerville obtained permission from the Secretary of the Commonwealth to set up four computers in the Aldermanic Chambers that were connected to the VRIS, so that at the same time as a voter was issued a ballot, the Elections Department could enter directly into VRIS the fact that that person had voted early.

349. These four computers were borrowed from the Commonwealth, and Somerville had to meet certain security requirements in order to obtain them.

351. Nine to 11 poll workers worked in the Aldermanic Chambers for each day of early voting. The Election Commissioners also assisted with early voting as they were able.

352. Salerno worked at the early voting site from 7:00 a.m. until 11 p.m. every day of early voting. The Elections Department staff also assisted with early voting as needed, spending approximately 30 to 35 percent of their time on this task.

354. Somerville received a \$2,000 incentive grant from the Commonwealth to operate early voting during weekend hours. This was the maximum amount allowed under the grant.

**e. Processing Voter Registration Forms and Running Elections in Revere**

355. Diane R. Colella is the Election Commissioner for the City of Revere. She is responsible for all aspects of elections in the City of Revere. Her duties include running elections; registering voters; maintaining the annual City census; producing the new street list book; maintaining an office staff and daily work flow; helping to resolve constituent inquiries; and assisting candidates with campaign finance reporting.

356. The Assistant Election Commissioner assists the Election Commissioner with the running of elections; processes online voter registrations; orders supplies; pays bills; notarizes documents; and works with constituents and others to satisfy requests for City services. The Junior Clerk's duties are the same as the Assistant Election Commissioner's, except that the Junior Clerk also processes mail-in voter registrations and enters birth, death and moving records into the city census.

357. In addition to time-stamping voter registration forms that arrive in the mail, if the form arrived in an envelope, the Revere Elections Department also documents where it came from and the postmark.

358. Sometimes a mail-in voter registration form will be hand-delivered to the Revere Elections Department. In that case, the Elections Department documents when it was delivered, who delivered it, and the relationship of that person to the voter.

359. When the Elections Department receives an online voter registration form, they first must determine whether it is a new registration, a change of name, address, or party, or a duplicate registration. If it is not a duplicate and all of the information is complete, then they process it.

360. The amount of time needed to enter the information from one voter registration form into VRIS varies. If the form is complete, the process takes one or two minutes. . . .

362. The Junior Clerk's position was vacant from August 2016 to February 2017. Therefore, there were only two Elections Department staff people processing voter registrations for Revere around the time of the November 2016 election.

363. As of October 19, 2016, at 8:00 p.m., there were 900 online voter registrations for Revere that were waiting to be processed into VRIS.

364. The Elections Department has four computers with access to VRIS.

**f. Preparations for Election Day in Revere**

365. Between October 19, 2016, and November 8, 2016, Colella had many duties, including responding to inquiries from voters and candidates, processing absentee ballot applications and completed absentee ballots that are mailed in, handling poll worker cancellations and poll worker training, and staffing early voting.

366. Colella and the Assistant Election Commissioner worked past the close of business hours during the week that included October 19, 2016. They also worked on both Saturday and Sunday between October 19, 2016, and the start of early voting on October 24, 2016.

367. The Assistant Election Commissioner is entitled to time-and-a-half pay for overtime hours worked. During the 2016 election cycle, she accrued 40 hours of overtime.

368. The Revere Elections Department must test its equipment prior to election day. This involves setting Revere's tabulators up and running sample ballots through them, as well as testing Revere's AutoMARK voting machines. It takes about a day to test the tabulators and another day to test the AutoMARKs.

369. Prior to election day, the Elections Department packs a supply box for each polling place. The supply box contains numerous items, including pens, rulers, notepads, calculators, surge protectors, signage in English and Spanish, specimen ballots, provisional ballot items, affidavits of current and continuous residence, and a complete voter list for that precinct. Colella and the Assistant Election Commissioner begin assembling the supply boxes a couple of months before election day.

370. After the October 19, 2016, voter registration deadline, but before early voting started on October 24, 2016, Colella printed a voting list of all registered voters to be used at the early voting site. The voter list was then printed again after early voting ended and prior to election day. The voting list for Revere takes less than one day to print.

371. The names of specially qualified voters who register after the voter list is printed are handwritten onto the voter list in the spot where they would otherwise have been included on the list. They are also provided with a certificate to present at their polling location that indicates that they are permitted to vote on election day.

**g. Early Voting in Revere**

373. Early voting in Revere took place at the American Legion Building. It did not take place at Revere City Hall because there was not enough space there.

374. Each individual voter on the early voting list has a unique bar code. At the end of each day of early voting, the Elections Department staff would scan the bar code for each person who had voted, which uploaded that information into VRIS. The letters "EV" then appeared beside the name of each person on the election day voter list who had voted early, to prevent anyone from voting twice.

**h. Election Day in Revere**

375. On election day, Colella arrives at Revere City Hall at 5:00 a.m., where the supplies for the day are loaded onto three trucks and delivered to polling locations throughout the city. There are also police officers present to receive assignments as to which polling locations they will monitor. Each polling location gets a tabulator machine, a box of unused ballots, and a supply box.

376. After the trucks depart, Colella goes to the Elections Department office to field any phone calls regarding issues that may have come up since the polls opened. By about 7:45 a.m., she leaves the office to visit each polling location and address any problems.

377. The Elections Department office is open to the public on election day. The Assistant Election Commissioner remains there during the day to answer phone calls and assist any visitors.



**i. Provisional Ballots**

378. It takes longer to process a provisional ballot than an ordinary ballot. If someone casts a provisional ballot, the poll worker notes this on the voter list and places the ballot in an envelope. The voter's registration information is later checked against records from the Registry of Motor Vehicles and the VRIS, which can take a couple of days.

**j. Chelsea**

380. Polling places in Chelsea are staffed by wardens, clerks and inspectors. They are hired by the day. A warden is paid \$235, a clerk \$210 and an inspector \$150 for the day.

381. Poll workers are given a poll book of everyone who is registered to vote and a code such as AV (to denote absentee voter) or EV (to denote early voter).

382. If someone's name is not on the list, they fill out a provisional ballot, show an ID, the provision ballot is sealed and they research after the fact [why the voter was not included on the paper list].

383. The Chelsea clerk's office handles parking, census records, vital records such as birth, death and marriage, posting agendas for minutes for meetings of boards and commissions, conflicts of interest, dog licenses as well as elections.

**k. Boston**

384. The City of Boston received 35,135 voter registration applications between October 1, 2016 and October 19, 2016.

385. The City of Boston received the last voter registration application that was effective for the November 8, 2016 election on November 7, 2016.

387. 400 voters voted provisionally during early voting in the City of Boston.

388. Of those 400, more than half – 257 – of the votes were ultimately counted once the corresponding voter registrations were processed.

## **I. Statistical Analyses**

499. In the 2012 presidential election, a one-day change in Massachusetts's voter registration deadline [would] not have increased voter turnout.

506. A state may have both a voter registration deadline and election-day registration.

507. Massachusetts could adopt election-day registration while retaining, modifying, or limiting its 20-day closing date.

511. States have an interest in combatting voter fraud or insecurity in the voting system.

512. Many states do not have online voter registration.

513. Wisconsin recently began to implement online voter registration, but it was not in effect for the 2016 election.

514. States in the United States have adopted election-day registration in waves.

515. In the first wave of election-day registration adoption, Maine, Minnesota, and Wisconsin adopted election-day registration in the early 1970s.

516. Maine, Minnesota, and Wisconsin are states that have traditionally valued voter participation and have had open election systems.

517. In the second wave of election-day registration adoption, Wyoming, New Hampshire, and Idaho adopted election-day registration in the early 1990s.

518. New Hampshire adopted election-day registration because it was concerned with having to comply with the National Voter Registration Act of 1993 and states that had election-day registration were exempt from complying with that law.

526. As a result of election-day registration, voters could be confused about where to check in and register, and the room might be more crowded with poll workers, signage, and tables.

529. Voter turnout is affected by a range of factors, including the issues in a race, what groups or campaigns are doing, and the demographics of the voters.

535. To the extent that election-day registration increases voter turnout, a lot of that effect is due to people who are already registered using election-day registration to update their name and address and cast a ballot at that time.

536. Election-day registration does not result in election officials receiving a lot of registration forms from people they have never encountered before.

538. A battleground state is a state in a presidential election where both campaigns have invested a lot of effort because they believe the state is in play for either side to win.

539. Battleground states tend to have higher levels of voter participation than other states.

540. Massachusetts is not a battleground state.

542. It is more difficult for voters to register in states that have earlier closing dates than Massachusetts, require different documentation with the registration form, or do not have online registration.

543. Massachusetts is in the middle of the mix of states when it comes to ease of voter registration.

551. Early adopters of election day registration were Maine, Minnesota, and Wisconsin between 1972 and 1976. These states have been described as adopting EDR happily and with enthusiasm. These states are known as “Wave 1” states.

### **III. THE COURT’S ADDITIONAL FACT FINDINGS**

The Court finds the following additional facts by a preponderance of the credible evidence:

#### *1. Election Activity after the 20-Day Deadline.*

As commonly occurs for nearly every election, many events and election-related activities took place after October 19 and before the November 8, 2016 election. Many such events occur late in the campaign by design. In recent gubernatorial and presidential elections,

for instance, debates, endorsements, editorials and increased campaign advertising all occurred at or after the registration cutoff. Due to media attention, people become more aware of the election as it gets closer. It stands to reason that private discussions among friends and associates also increase at the same time.

Public interest in and media coverage of an election increase up to and after the 20-day deadline, as Election Day approaches. Quantitative research shows that internet searches for information on voter registration increases over the course of the campaign and steeply climbs to a maximum just as the registration period closes. There is a strong correlation between such searches and actual voter registrations, as long as the registration period is open. Anecdotal evidence confirms that some citizens only become interested in the upcoming election after the closing date.

Events occurring after the 20-day deadline not only affect voter interest, but also increase the desire of unregistered voters to register for the purpose of voting in the upcoming election. In the few weeks before the election, people seek out registration opportunities from organizations like the Chelsea Collaborative. The 20-day deadline precludes voting by those who, for whatever reason, do not learn before that date about the deadline or who learn after the deadline that the election will address issues or candidates that interest them sufficiently to vote. Thus, in Massachusetts and other non-EDR states with pre-election registration deadlines, potential voters who become engaged in the weeks running up to the election, but who failed to register prior to the registration deadline, are unable to turn their interest into a vote. Thousands (and probably tens of thousands) of Massachusetts voters fall into this category each election cycle.

Peak voter registration occurs at the time of the closing date for states with registration deadlines. For EDR states, that peak is on election day.

In states without EDR, like Massachusetts, voters are more likely than the national average to report that failure to meet the registration deadline was the reason they did not vote. In Massachusetts, 19.9% of voters who did not vote in 2014 cited the registration deadline as the reason, compared to 9.9% nationally. Results for prior years 2008, 2010 and 2012 are similar, although the gap between Massachusetts and the nation as a whole is not as large. The true number may be less, because of the tendency of poll respondents to choose reasons that blame others rather than themselves. Even so, the number is very substantial. Moreover, the same tendency would apply to national respondents, making comparisons between national and Massachusetts data particularly instructive. While the data for any given year may have some measurement error, the consistent trend over four election years demonstrates that the 20-day deadline is an impediment to qualified citizens registering to vote in time to cast a ballot in the next election.

In 2014, there were 4,896,226 people in the voting-eligible population in Massachusetts. According to the Secretary of Commonwealth, in 2014, the number of registered voters was 4,301,118. Taking the difference between the two numbers implies that 595,178 Massachusetts residents were eligible but not registered to vote. According to the CPS, 19.9% of potential Massachusetts voters did not vote in the 2014 federal election because they “did not meet registration deadlines.” This would translate to 118,440 people who were deterred from registering for the 2014 federal election on account of the voter cutoff law.

The experience of plaintiff, Chelsea Collaborative confirms these general observations. Based on more than 2 decades of experience, Chelsea Collaborative knows that it would be best to ramp up its voter mobilization and voter education efforts at least 5 weeks before the election. Because of the voter registration deadline, however, Chelsea Collaborative concentrates on voter registration through the registration cutoff and is unable to focus fully on voter mobilization and

voter education until the final 20 days before the election. This is not efficient, because it is easier to register voters very close to the election, at which time voters come to Chelsea Collaborative, instead of devoting resources to trying to get them to register before the deadline. In 2016, Chelsea Collaborative would have been able to devote more resources to their voter education and mobilization efforts, and would have been able to do so sooner, if it were not for the 20-day registration deadline. A registration deadline that was closer to Election Day would allow Chelsea Collaborative to direct more of its resources to voter education and mobilization.

2. *The Secretary's Voter Registration Information System (VRIS)*

VRIS was created in 1994 and implemented in 1995 (or early 1996). Before that time, no computerized state-wide voter data base existed. Since 1995 or early 1996, each City and Town has had hardwired access to the Secretary's voter registration data base. Although voter registrations are entered on a state-wide data base, VRIS is a closed system: it is not connected to the internet. Each local election official is connected directly to the system. Access to VRIS is limited to computers provided to local election officials by the Secretary's Office.

Apart from the local election official's access (and any additional access approved by the Secretary), VRIS cannot be remotely accessed and cannot communicate with electronic poll books. As noted below, Somerville was able to develop a way to use VRIS for early voting, but use of computerized databases on election day is not in place. One benefit of a voter information system that is not connected to the internet is its resistance to outside interference.

Data from a registration received in person or through the mail is entered into VRIS. If the form is sent in by mail, the local election official records the postmark date in VRIS. If the postmark is missing or illegible and the form is received within five days of the 20-day deadline, the deadline date is used as the date of registration within VRIS.

Data received electronically is forwarded to the appropriate local elections official electronically. Each morning, the municipal elections department receives a queue of pending voter registrations through VRIS. The elections department then processes that queue as part of its daily duties.

### *3. Online Voter Registration*

Voters may register on-line until the 20-day deadline. The Secretary withdraws the option for on-line registration at 12:01 a.m. on the day after the 20-day deadline until the election. Otherwise, additional voters likely would register on line. It appears that the purpose behind shutting down on-line registration is to convey the message that it is too late to register to vote in the next election, and to prevent use of resources to process registrations that will not make a difference until after the upcoming election.

The online voter registration system includes a tool that allows voters to search for their voting status and determine whether they need to make changes to their voter registration.

### *4. In-Person Registration at a Voter Registration Agency or at the Registry of Motor Vehicle*

When an applicant submits a voter registration affidavit at an agency, an employee at that agency must review the form for completeness, provide the applicant a copy, and then transmit the form to the appropriate local election official within five days. 950 CMR 57.05(3)(a). For applications completed in-person at the RMV, the RMV must electronically transmit a completed voter registration affidavit to the local election officials of the city or town where the applicant resides within five days after the affidavit is completed by the applicant. 950 CMR 57.06(3)(a).

##### *5. Registration and Processing Activity after the 20-Day Deadline*

Neither voter registration, nor local officials' processing of registrations, stops after the 20-day deadline. The Secretary has instructed local election officials to continue processing voter registration applications upon receipt even after the statutory registration cutoff. In an October 3, 2016 training presentation from the Secretary sent to all city and town clerks, the Secretary instructed local election officials to process the "pending for certification" queue every day. Consistent with this instruction, the City of Revere processed upon receipt all of the voter registration forms it received between the voter registration cutoff and Election Day in November 2016.

For example, 2,100 voter registrations occurred after October 20 to November 8, 2016, inclusive, in Boston, Chelsea, Revere and Somerville alone. While 273 of these voters did vote in the November 8, 2016 election (some of them as specially qualified voters, see below), 1,827 did not.

The amount of time needed to enter the information from one voter registration form into VRIS varies. If the form is complete, the local election official adds the applicant's name, address, and effective date of registration to the annual register of voters by entering the information into VRIS. 950 CMR 57.04(3)(b), 57.05(4)(b), 57.06(4)(b), 57.07(4)(b); 58.03(1). For a complete application or on-line form, the VRIS data entry process takes one or two minutes. The local elections official can tell if a form is incomplete or incorrect because required information may obviously be missing, or the voter may have forgotten to sign it. The form may also have address or date of birth information that conflicts with the voter's preexisting records in VRIS. For example, a voter may try to register with an address that does not exist in city and U.S. Postal Service records. This type of issue must be resolved before certification and entry of the registration into VRIS. If the information in an on-line or mailed-in



form is incomplete or incorrect, elections officials will seek information from the applicant, which may be received up to a week later, at which time the form is ready for processing. In-person registration may permit faster processing.

Only one city or town in Massachusetts – Boston – was unable to include all registered voters on its printed voter list in advance of early voting for the November 2016 election. Processing the Boston voter registration applications continued after the October 19, 2016 voter registration deadline and required about 9,000 hours of work by 30 personnel. As in past years, Boston received staffing assistance from the Secretary of the Commonwealth's office to process the ballots. To meet its early voting obligations, Boston provided provisional ballots to any voter not on Boston's voter list who claimed to have submitted or updated his or her registration prior to the Voter Cutoff Law deadline. There is no evidence that any problem arose with early voting or counting of early votes other than the need to use provisional ballots itself. For the November 2016 election, no other city or town in Massachusetts needed to do this.

#### *6. Early Voting and Preparations for Election Day*

For the November 2016 election, local elections officials were able to, and did, perform the necessary tasks in timely and orderly fashion. Early voting was a success in Massachusetts, viewed from the standpoint of increased voter convenience, the absence of reported voting by unqualified voters, the capacity of municipal election officials and the lack of security problems. To keep track of voters who participate in early voting and ensure that voters do not vote twice, local election officials input early voters into VRIS either in real time while the voter was voting, or by inputting information from a voting list at the end of each day during the early voting period.

The Election Day voter lists cannot be printed until after early voting concludes. Local election officials print the necessary voter lists. Two copies (check-in and check-out) must be

prepared for each precinct. When local election officials print voter lists for Election Day, the Commonwealth's computer program excludes from the printout those citizens who appear in the VRIS database, but whose registrations were deemed submitted after the 20-day deadline. Voter lists can take up to several hours to print, although they sometimes can be printed more quickly. For example, local election officials in Revere completed printing its voter lists for the November 2016 election in approximately 2 hours. Local election officials in Boston completed printing its voter list for the November 2016 election in less than one day.

The experience of municipal elections officials who testified sheds light on the tasks that local officials must complete before each election, particularly between the 20-day deadline and election day. For approximately two months around the November 2016 election, the Somerville Elections Department staff was extremely busy and put in extra hours to make sure that the election ran smoothly. They often arrived at work at 7:00 a.m. and left late at night. The implementation of early voting in 2016 required additional effort and resources during the early voting period, compared to prior years. Some of this effort was shifted from the burdens incurred on election day. With a significant portion of the electorate voting early, the volume on election day is correspondingly less (except to the extent that turnout increases). Lines on election day are correspondingly shorter. Allowing voters to vote early also cuts down on the need for some voters to cast absentee ballots.

Exercising its discretion, Somerville elected to have one early voting site, in the Aldermanic Chambers at City Hall. The early voting site required a complete voter list. Printing that list took about a day. Because VRIS is a closed system that is not connected to the internet, in order to use the four VRIS computers in the Aldermanic Chambers for early voting, Somerville had to pay an electrical vendor to extend the VRIS wiring from the Elections

Department office to the Aldermanic Chambers, at a cost of \$1,500 to \$1,800. That wiring is now in place for future elections, and that cost need not be incurred in the future.

It took about two hours after early voting closed for the day for the Elections Department staff to gather the ballots, bring them downstairs in City Hall, and sort them alphabetically by ward and precinct. Exercising its discretion, Somerville decided to keep those ballots at a central location in City Hall, rather than sending them to the precincts, where counting those ballots would have added to the burden on precinct election officials.

Prior to election day in November 2016, the Somerville Elections Department had to recruit approximately 23 poll workers to staff the location where the early voting ballots were tabulated. In addition, Somerville hired approximately 10 poll workers for each of the 21 polling locations, for a total of approximately 230 poll workers.

It takes about one day (sometimes two days) to print, organize and distribute the voter lists to be used on election day for all of the Somerville polling locations. It takes between four hours and a whole day to test Somerville's AutoMARK machines. Each machine must be set up, booted up, and all of its functions must be checked to ensure that they are operational.

The Secretary has directed that, after the election, all provisional ballots must be processed within 12 days (November 20 for the November 8, 2016 election) so that each municipality can certify its results.

#### *7. Specially Qualified Voters*

By statute, three categories of persons are excused from the 20-day deadline: (1) specially qualified voters who meet certain requirements throughout the seven days prior to the deadline, (2) American citizens who are naturalized between the cutoff and Election Day, and (3) citizens who turn eighteen years old between the cutoff and Election Day. G. L. c. 51, § 50; G. L. c. 51, § 47A.

Local election officials are responsible for processing Specially Qualified Voters. To each person who registers as a Specially Qualified Voter, the local election official issues a certificate entitled "Supplementary Registration—Specially Qualified Voter." G. L. c. 51, § 51. By presenting the certificate to the presiding officer at the proper polling place, the Specially Qualified Voter has the right to vote in the election. G. L. c. 51, § 51. Local election officials must include Specially Qualified Voters' names on their voting lists, by handwritten additions if necessary. If a Specially Qualified Voter's name does not appear on a voting list, that voter is still permitted to vote in the election. After a Specially Qualified Voter casts her ballot, the officer attaches the certificate to the voting list. G. L. c. 51, § 51; 950 CMR 52.03(29).

The existing capacity of local officials to process specially qualified voters on election day shows that at least some election day registration is feasible and causes no problems with administering the election. Somerville election officials have the capacity to smoothly process a much higher number of Specially Qualified Voters without changing its current operations. In the election of 2016, Revere was able to handle all 47 specially qualified voters who appeared on election day. There is no indication that any Massachusetts municipality had difficulty doing so.

#### *8. Election Day Registration*

One alternative to the 20-day deadline is EDR, which can operate either with or without a deadline for pre-election registration.<sup>3</sup> EDR increases turnout of new voters who otherwise would not participate because they were not registered by the 20-day deadline. EDR also increases turnout among people who are already registered because it permits them to update their names and addresses on Election Day. As a result, EDR makes it easier to maintain up-to-

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<sup>3</sup> The plaintiffs do not challenge the twenty day registration period, standing alone. Rather they challenge the combination of (1) the 20-day deadline and (2) a prohibition upon voting unless the citizen registered by that deadline.

date voter registration rolls and encourages voters to cast ballots at the polling places that reflect their current addresses.

At least in some jurisdictions, voters who fail to register by the registration cutoff deadline, but who could be motivated to vote during the 20-day run-up to the election, tend to be lower income and minority voters. Also, in some jurisdictions, allowing voters to register to vote and vote on the same day benefits people who have moved shortly before the election, who are on average younger, of lower income, and are more likely to be racial and ethnic minorities. However, EDR is often used by busy people with demanding jobs, who want to avoid taking time to register before the election; those people tend to be older than average and to have income levels, socio-economic status and education above the average for the eligible population. It is likely that all of these subpopulations, and others, would turn out in greater numbers, but the data from other states do not enable the Court to make reliable predictions about what groups may benefit more than others from EDR. There is currently no reliable set of estimates to draw any conclusions about whether any given subpopulation in Massachusetts would gain relatively more or less than other groups from EDR in terms of voter turnout.<sup>4</sup>

In states with EDR, the ability to register voters on election day has significant administrative benefits, but also requires additional staff to process new or updated registrations. In those states, EDR sharply reduces the number of provisional ballots used, conferring a significant administrative benefit. States with EDR have historically had the fewest problems with voter registration. Wait times do not appear to be longer in states with EDR, and adding a

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<sup>4</sup> Dr. Burden's analysis found that while EDR increases voter turnout among all demographic groups, the likely impact of EDR on turnout in Massachusetts would be larger for certain demographic groups, namely Latinos, those with less education, younger people, the unmarried, those with lower incomes, people with disabilities, and people who recently moved. The Court finds that this is entirely possible, although the data do not permit making firm predictions in this area.

registration option at the polls did not extend the voting process in general. EDR has not been reported to lead to more than a small increase in costs. Instead, costs mostly shift from one time period (receipt and processing of forms before the cutoff date) to another.

Many scholarly studies have examined the relationship between EDR and voter turnout.<sup>5</sup> These studies are diverse and use different data, analyze different states and election years, and employ different statistical models. The weight of these studies point to the same conclusion: EDR increases voter turnout, all else being equal. It may also increase voter registration, but the data do not show this conclusion with high confidence. The data show that reducing, by one day, the number of days in Massachusetts's voter registration deadline would not have affected either voter registration or voter turnout in the 2012 presidential election. The experts have not studied the effects of a larger reduction, such as 10 or 5 days. Indeed, research can be difficult in this area, given the number of variables and permutations of voting laws. For instance, some studies suggest that when a state simultaneously adopts election-day registration, same-day registration, and early voting, voter turnout falls rather than rises. It is hard to know whether this counter-intuitive result is true, or simply the result of chance or uncertainty in trying to analyze the effects of possible changes in elections laws.

Likewise, it is possible to make some reasonable forecasts about the impact of EDR, if adopted in Massachusetts, but the data do not permit predictions with high precision or confidence. The regression analysis originally conducted by the plaintiff's expert, Dr. Barry Burden, found that EDR would have increased turnout in Massachusetts by 8.2% during the 2012 election, which means an additional 394,393 people would have voted. Dr. Burden

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<sup>5</sup> It is not clear that predictions about increases in turnout in registration, or forecasts of which groups will disproportionately benefit from EDR, has any relevance to the issues before the Court. Because, however, the parties have litigated this issue with some vigor, and because an appellate court may wish to consider these issues, the Court finds facts on them.

acknowledged on the stand that accounting for an omitted variable – a state’s culture regarding turnout – would reduce this number. His later estimate of 5% increase in turnout is reasonable, in light of the published studies considered by both experts. However, the Court finds that the Commonwealth’s expert, Dr. Charles Stewart, correctly focused upon fixed effects and differences-in-differences models, to eliminate bias (principally, omitted variable bias). Those models collectively suggest a 2-3% increase in voter turnout with enactment of EDR. Dr. Stewart suggests, but does not actually predict, that EDR would increase turnout in Massachusetts somewhat less -- by 1 to 2 percentage points -- because Massachusetts was not a “wave 1 state” (early and enthusiastic adopter of EDR). In the 2014 election, a one to two percent increase would have translated to between 48,963 and 97,926 additional voters.<sup>6</sup> It is true that, for various reasons, including differences in state attitudes toward voting, higher turnout rates in EDR states cannot be wholly attributed to the adoption of EDR. The Court is not, however, persuaded to depart from the national average by Dr. Stewart’s reasoning, because, among other things, Massachusetts was also not a wave 2 state (“reluctant”) state. The nationwide data capture both enthusiastic and reluctant states. There is no good reason to assume that EDR in Massachusetts would have a different positive effect here than nationwide. To the extent that such predictions are relevant, therefore, the best estimate is a 2-3% increase in voter turnout due to EDR, with a reasonable range from 1% to 5%.

Both experts have first-hand experience with, and have professionally studied, EDR. Dr. Stewart agreed with Dr. Burden that EDR imposes only a modest burden on local election officials and is not less secure than a registration deadline, assuming laws to deter and detect fraud. The two experts agreed that a well-designed EDR system can be good public policy. The

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<sup>6</sup> Researchers have found larger, positive turnout effects of election-day registration for first-wave states who adopted EDR in the 1970s and smaller effects for second-wave states in the 1990s.

Court considers these parallel opinions not for their policy conclusions, but rather as a support from experts who are very familiar with EDR, for the conclusion that EDR can be, and has been, adopted in ways that do not create significant problems with security, fraud, accuracy of assessing voter qualifications, or orderly administration of elections. The Court adopts that conclusion as a finding of fact.

#### *9. Automatic Voter Registration*

Another possible addition or alternative to the current system in Massachusetts is automatic voter registration. Automatic voter registration would likely increase the rate of voter registration in Massachusetts. Automatic voter registration might increase voter turnout in Massachusetts. It would not fully address the problem of voters who, for whatever reason, do not decide to register until after the registration and do not have a transaction that would automatically register them.

#### *10. Elections in Massachusetts*

On election day, local officials use printed voter lists to conduct the elections. With some exceptions (including on-line registration that does not include required identification number information), Massachusetts voters are not required to show identification in order to vote.

No provision in Massachusetts state law or regulations requires local election officials to refer potentially fraudulent applicants for criminal investigation and potential prosecution if their registration acknowledgement forms are returned to local election officials as undeliverable. Such referrals do occur, although rarely.<sup>7</sup>

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<sup>7</sup> The Court makes these findings in response to the Commonwealth's proposals, whether or not they turn out to be relevant.



#### IV. MASSACHUSETTS VOTER REGISTRATION LEGISLATION

G. L. c. 51, § 1, requires a citizen to “compl[y] with the requirements of this chapter” in order to “have his name entered onto the [municipality’s] list of voters” and to “vote therein in any such election.” A citizen cannot comply with the requirements of G. L. c. 51 unless, with some exceptions, he or she registers 20 days before election day. G. L. c. 51, § 26 (“except as provided in sections thirty-four and fifty, registration for the next election shall take place no later than eight o’clock in the evening on the twentieth day preceding such election and no later than eight o’clock in the evening on the tenth day preceding a special town meeting.”); G. L. c. 51, § 34 (“After eight o’clock in the evening of a day on which registration is to cease, the registrars shall not register any person to vote in the next primary or election, except” for those standing in line by 8 p.m. of the deadline day). In elections for president and vice-president, G. L. c. 51, § 1F provides:

A person who resides in the commonwealth and in the city or town where he claims the right to vote in an election at which electors of president and vice-president are to be chosen, but whose name is not included in the current annual register of voters of the city or town where he claims the right to vote, **may qualify for voting only** for such electors upon application to the registrars of voters of said city or town, **not later than eight o’clock post meridian of the twentieth day preceding such election.** [emphasis added]

The exceptions to the 20-day deadline apply only to a narrow set of citizens and do not affect the outcome of this case. G. L. c. 51, § 34 (voters standing in line at the hour of the deadline), § 50 (specially qualified voters). Moreover, as shown by the case of Edma Ortiz here, the exceptions are not well-publicized or understood and may not be applied correctly in individual circumstances.

Historically, the Massachusetts legislature has often required voter registration prior to an election. See Capen v. Foster, 29 Mass. 485, 492-493 (1832); G. L. c. 51, § 26 (1928); G. L. c. 51, § 26 (1947); G. L. c. 51, § 26 (1973); G. L. c. 51, § 26 (1993); G. L. c. 51, § 26. In the early

1800s, selectmen or assessors met in session immediately before or on the day of the election, so as to give to every voter the means of knowing whether his name was on the voter list, and the opportunity to place it there if it was not. Capen, 29 Mass. at 495. By 1887, it appears that there was no generally applicable registration deadline, apart from the 30-day requirement applicable only to naturalized citizens, held unconstitutional under art. III in Kinneen v. Wells, 144 Mass. 497, 504 (1887).

The Legislature created a registration deadline of 20 days before state elections for cities in 1894, which it extended to towns in 1928. 1894 Mass. Acts c. 271; St. 1928, c. 103, § 1; G. L. c. 51, § 26 (1928). It extended that deadline to 32 days before a state primary, presidential primary, and state election in 1947. St. 1947, c. 34, § 1; G. L. c. 51, § 26 (1947). It changed the registration deadline to 28 days prior to presidential and state elections in 1973. St. 1973, c. 853, § 1; G. L. c. 51, § 26 (1973). Since the 1993 legislative session, Massachusetts has maintained a voter registration deadline of 20 days before any primary or election. G. L. c. 51, §§ 1F, 26, 34 (1993), as amended by St. 1993, c. 475, § 6, approved January 14, 1994. A Memorandum to then-Governor William Weld from his Director of Legislative Research dated January 13, 1994, reports that local election officials “object[ed] to any further shortening of the deadline.” There are no committee reports in the legislative record.

While the Legislature has not changed the registration deadline since 1993, it did reduce the period between registration cutoff and the first date on which voters may cast ballots when it authorized early voting, beginning with the 2016 biennial state election. G. L. c. 54, § 25B, added by St. 2014, c. 111 § 12, as amended by St. 2015, c. 119, § 13. “The voting period for early voting shall run from the eleventh business day preceding the general election until the close of business on the business day preceding the business day before the election ... .” G. L.

c. 54, § 25B(c) (emphasis added). That left only 5 days between expiration of the 20-day deadline on October 19 and commencement of early voting on October 24.

By St. 2014, c. 111 § 12, the Legislature also called for a study of various issues, including early voting, by an Elections Task Force, which was to submit a report by August 1, 2017. That Elections Task Force never materialized. While the Massachusetts Town Clerks' Association has spent considerable time preparing for that task force and has submitted some of its insightful and potentially helpful input to the Court, there is no elections study and no Task Force report. With near certainty, there will be no report by the deadline, which is less than two weeks away.

### DISCUSSION

The Massachusetts Constitution guarantees the fundamental right to vote. MASS. CONST. amend. art. III ("art. III") and Decl. Rts. Art IX. In particular, art. III (as amended through 2000) reads:

Art. III. Every citizen of eighteen years of age and upwards, excepting persons who are incarcerated in a correctional facility due to a felony conviction, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators or representatives, shall have a right to vote in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

See also MASS. CONST. amend. art. C (amending art. III to make eighteen the voting age); MASS. CONST. Amend. art. CXX (amending art. III to exclude incarcerated felons); G. L. c. 51, § 1 (replacing art. III's six-month residency requirement with the requirement that voters simply be "a resident in the city or town where he claims the right to vote at the time he registers"). Art. III grants the right to vote without restriction as to time of qualification, since a six month residency requirement is federally unconstitutional. See Dunn v. Blumstein, 405 U.S. 330, 332-333 (1972)

(holding Tennessee's durational residence requirement for voting unconstitutional). Indeed, art. III does not even mention registration as an advance qualification to exercise the "right to vote."

MASS. CONST. amend. art. IX provides an additional source of voting rights:

Art. IX. All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.

The question is whether the Commonwealth may deny thousands of constitutionally qualified voters the right to vote because of the 20-day deadline. A strict construction of art. III would prohibit any regulation imposing an advance registration deadline, because such a requirement would disenfranchise voters who, without question, have an art. III right to vote. The parties acknowledge, however, that the Legislature has some power to require voter registration, even though no constitutional language makes registration an additional voter qualification. The Courts therefore must define the breadth of the Legislature's power.

## I.

### A.

In plain and mandatory words ("shall have a right to vote"), the Constitution grants the right to vote to all citizens who meet its very short list of qualifications. That grant negates any legislative, executive or judicial power to deny that right. Kinneen, 144 Mass. at 499 ("whoever possesses" the constitutional voter qualifications "is by the Constitution entitled to this privilege, legislation cannot deprive him of it"); Opinion of the Justices, 247 Mass. 583, 586 (1924) ("The right of suffrage is thus defined and its qualifications are specified by the Constitution. The General Court can neither add to nor subtract from these essentials.").

The Constitution confers no express authority upon the Legislature to restrict or limit the voting rights of any qualified citizen. Indeed, MASS. CONST. chapter 1, section 1, article 4, prohibits legislation that is "repugnant or contrary to this Constitution." Id. ("To the

provisions of the Constitution all legislation is thus made subordinate, and it cannot add to nor diminish the qualifications of a voter which that instrument has prescribed.”). Any authority to legislate a postponement of the exercise of voting rights through statutes such as the 20-day deadline exists only by implication.

In the Kinneen case 130 years ago, the Supreme Judicial Court has recognized the limits upon legislative authority in this area:

Any legislation by which the exercise of his [i.e. a citizen constitutionally qualified to vote] rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is **reasonable and necessary**, in order that the rights of the proposed voter may be ascertained and proved, and thus the rights of others (which are to be protected as well as his own) guarded against the danger of illegal voting.

Id. (emphasis added). The Court also observed that the facts needed to determine a voter’s eligibility are “simple and susceptible of rapid investigation.” Id. at 502. The Legislature may make “suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right.” Id. at 501, quoting Capen, 29 Mass. at 489, 492 (Legislature lacks power “under the pretence and color of regulating” to “subvert or injuriously restrain the right itself.”). See Opinion of the Justices, 247 Mass. at 587 (“While the Legislature cannot change in any particular the qualifications required to enable one to vote, it may make reasonable rules and regulations for ascertaining those who possess such qualifications. Such rules and regulations must be observed before one can become a legal voter under the Constitution.”). As to voter registration in advance, the Court in Kinneen said: “[n]o system would be just that did not extend the time of registration up to a time as near that of actually depositing the votes as would be consistent with the necessary preparation for conducting the election in an orderly manner and with a reasonable scrutiny of the correctness of the list.” Kinneen, 144 Mass. at 502.

Kinneen's Constitutional boundaries are clear in most cases. Absent a need for time to check a person's eligibility to vote, the Legislature has no power to prevent constitutionally qualified citizens from voting. It cannot effectively create a new qualification for voting. It must regulate by reference to the time needed to conduct an orderly election and to scrutinize the list of voters for correctness. This Memorandum will refer to these principles generally as the "necessity" test.

The necessity test is an objective one with a fairly narrow scope, focusing upon whether a statute requiring advance registration allows only for the time needed to ensure voter qualifications and orderly elections. It does not call for judgmental assessments of the degree of intrusion upon voting rights, the strength of the governmental interest, whether alternatives are less restrictive or even "reasonableness." Far from injecting the judiciary into policy debates, it protects democracy at the most basic level – the individual voter's right to cast a ballot – from government intrusion. That is true even when elected officials enacting the statute believe that they are acting with the best of intentions, because art. III precludes even elected legislators from dictating who shall and shall not be able to vote for them.

Recent history shows that, even if the Legislature has good reasons for a new voter disqualification, it may not do so without a constitutional amendment. At the time of Cepulonis v. Secretary of the Commonwealth, 389 Mass. 930 (1983), most prisoners effectively could not vote, because they could not comply with the law requiring most voters to register in person. While there were arguably sound policy reasons in general to preclude at least felons from voting, the Supreme Judicial Court concluded that preventing fraud was not one of those reasons; it ruled that "to the extent that G. L. c. 51 and c. 54 prevent prisoners domiciled in Massachusetts from registering to vote, they are unconstitutional." Cepulonis, 389 Mass. at 937. The people of Massachusetts then amended art. III to prohibit felons from voting, by adding the language on

that subject that appears in the text of art. III, quoted above. See MASS. CONST. amend. art. CXX. See generally Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009), cert. denied 131 S.Ct. 412 (2010) (discussing art. CXX). Significantly, however, the people did not enact precisely the same provision as the Legislature; they limited the disqualifications to incarcerated felons, rather than all prisoners, felons or convicts. In several ways, then, legislation is no substitute for compliance with the provisions of the Massachusetts Constitution regarding constitutional amendments.

In opposing this application of Kinneen here, the Commonwealth argues (Comm. Supp. Mem. at 2-3; Comm. Mem. at 11-12) that the 20-day deadline is not a new voter “qualification.” It characterizes the registration cutoff as a “reasonable rule[] and regulation[]” or a “reasonable nondiscriminatory measure” of elections, which imposes only a “modest burden” on the right to vote. Constitutional analysis does not turn upon word choice or characterizations. Cf. McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545, 551 n.8 (1993) (declining to resolve the parties’ different understanding of the word “adequate,” which does not appear in the Education Clause of the Massachusetts Constitution). Under Kinneen, the Legislature has power to enact laws that are necessary and reasonable to ensure that voters meet the constitutionally prescribed qualifications. Whether such laws are “qualifications” or not is immaterial; they are authorized by necessary implication from the Constitution. In the absence of necessity, however, legislation that denies the right to vote by constitutionally qualified citizens violates art. III. The fact that sound analysis may fairly refer to such invalid legislation in short-hand fashion as a “new qualification” does not transform the analysis into a linguistic one.

Contrary to the Commonwealth’s argument, Cepulonis did not effectively overrule Kinneen’s analysis of art. III’s limitations upon Legislative power. Because of significant

differences in the factual context and arguments of record,<sup>8</sup> nothing in Cepulonis suggests that an unnecessary restriction on the right to vote may be justified under a “sliding scale” balancing test, of the sort discussed in part II below. Indeed, Cepulonis found the statutes in question to be unconstitutional because they operated to deny prisoners the right to vote. Nor did Capen provide any insight into a registration cutoff as long as 20 days, as the law in question required the selectmen “to be in session a sufficient length of time, shortly before the election, and for an hour at least on the day of meeting and before the opening of the meeting, to receive evidence of the qualifications of those whose names may have been omitted.” Capen, 29 Mass. at 492. Kinneen, decided after Capen, gave content to some of the broad language that the Commonwealth (Comm. Mem. at 10-11) quotes from Capen.

Finally, the necessity test meets the Commonwealth’s separation of powers argument under Article 30 of the Massachusetts Declaration of Rights. The art. 30 argument presupposes that legislative power exists. Absent necessity, no implied legislative power exists, so no separation of powers issue can even arise. To be sure, in close cases, there is a need for judgment, line-drawing and deference to any legislative determinations of necessity. In clear cases like this one, however, the necessity test lends itself naturally to adjudication on the facts and law, without the need for policy choices. Where the statutory registration deadline is not necessary to ensure a voter’s qualifications, the Constitution unequivocally places the citizen’s right to vote first. Saying so, even in a judicial opinion, does not violate legislative authority.

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<sup>8</sup> It is worth noting several distinguishing features of Cepulonis. That case did not involve an express or even direct limitation on the right to vote; nor did it consider an argument that the practical equivalent of such a limitation (as presented on the record before it) constituted an unlawful additional voter qualification under art. III.



**B.**

Every legal test advocated in this case requires considering the question of necessity.

As the facts demonstrate in a number of ways, this is not a close case on that question.

First, early voting occurred in 2016, starting only 5 days after the 20-day deadline. Since all registered voters were entitled to vote early, the voter lists had to be compiled, printed and delivered to polling places during that 5-day period. The Legislature thus determined that it was possible to allow votes by persons who registered only 5 days earlier. Experience, reflected in the record of this case, supports the accuracy of that determination. Municipal elections officials were able to compile the voter lists and print them within the 5 days available, such that early voting in fact commenced across the Commonwealth as scheduled. They were able to record the identities of early voters, enter them in the data base, and print out revised voter lists (reflecting who voted early) between the close of early voting mid-day on Friday, November 4 and election day, November 8. All municipalities were able to process all voter registrations received on or before October 19 in time to print the lists for October 24, with the sole exception of the City of Boston, which had a pattern of late processing in 2008, 2012 and 2016. Even in Boston, early voting proceeded on schedule, with the City accepting approximately 400 provisional ballots from those whose applications had not yet been entered into the system. The early voting statute and subsequent experience prove convincingly that 20 days is not necessary to process voter registrations, ensure the accuracy of voting lists and conduct orderly balloting.

Second, the claim that 20 days advance registration is necessary in order to permit election day voting is belied by the nature of the tasks required to process voter registration applications accurately, with attention to necessary verification of information and eligibility. Processing a complete application requires only about 2 or 3 minutes. Printing of full municipal voter lists generally take about two hours, with production of the package actually sent to each

precinct consuming about one day, possibly two. In practice, and as instructed by the Secretary of the Commonwealth, processing of applications continues even after the deadline expires, adding to the VRIS data base available for printing before the election. Printing the *full* VRIS data base immediately before election day would permit voting by these late registrants, who have undergone the same level of scrutiny, by election day, as all persons eligible to vote.

Thus, there are already some voters whose post-deadline registrations are processed without difficulty, potentially enabling them to vote on election day in the same manner as everyone else. It is only because *VRIS is explicitly and affirmatively programmed to exclude registrations* received after the deadline that the municipal election lists do not reflect the names of registered voters in the data base who submitted applications less than 20 days before the election. There is no conceivable necessity that warrants denying these fully qualified and certified voters their right to vote in the election.

Third, Section 1F was last amended on January 2, 1997 by St. 1996, c. 454, § 7. The Legislature has not weighed the burden of the 20-day deadline in 20 years, despite the obvious advances in information technology, other changes in resources and practices, and even statutory authorizations that have affected whatever arguments may have favored that deadline in 1997. Moreover, no study or factual investigation preceded enactment of the 20-day deadline, which appears to have a political origin, not a factual one. The sparse “legislative history” (in the form of a memorandum to Governor Weld from his Director of Legislative Research, dated January 13, 1994), reports that “[t]own clerks have agreed to ‘20 days’ but object to any further shortening of the deadline.” An objection by clerks in 1994, without accompanying data or analysis, is not proof that a 20-day deadline was necessary then, let alone in 2017. That legislative strategy position had and has no persuasive force under the necessity test. More

recently, the concerns of the Office of the Secretary of the Commonwealth led it to recommend a shorter period for early voting (five days instead of ten), which would end a full week before the election. The Legislature adopted a longer period, ending on Friday before the Tuesday election. The success of early voting in 2016 demonstrated that there was no need to adopt the shorter period.

Fourth, the 40-year history and experience of 16 other states plus the District of Columbia demonstrate the feasibility of election day or same day registration. Those alternatives demonstrate that a 20-day deadline, enforced by disenfranchisement, is not necessary to the accuracy or integrity of the elections process. Indeed, the experience of Milwaukee suggests that even a municipality roughly the size of Boston, with a diverse urban population, can handle 45,000 registrations on election day itself, followed by processing and entry into the computer system within 40 to 45 days after the election. There is no showing that Milwaukee's success would be difficult to replicate here.

Fifth, the fact that elections officials are very busy during election season – unquestionably true – does not establish necessity. The testimony and evidence in this case renewed the Court's admiration and respect for the work done by dedicated local elections officials, but from a constitutional point of view, they are simply doing their job. Changing or eliminating the 20-day requirement would shift their work from one period to another, but would not make it impossibly difficult to accomplish the necessary tasks, as shown by the early voting experience in Massachusetts and the election day registration experience in many other states. As conscientious public servants, many election officials testified in this case that, if the law requires it, they would implement shorter registration periods or election day voting. The argument that the present system is easier to administer, even if true (given that the tasks must be

performed at some time anyway), falls short of showing any necessity to deny the right to vote of citizens who did not register at least 20 days before the election.

Finally, the legislative enactments themselves require the most serious consideration and warrant judicial deference. The degree of deference they should receive is unclear, and awaits appellate determination. In Cepulonis, 389 Mass. at 935-936, the Supreme Judicial Court applied the traditional strict scrutiny test (see part II below) requiring that “when it defends the constitutionality of a statute impinging on fundamental rights, ‘the State must demonstrate affirmatively that the challenged provision promotes a compelling State interest which could not be achieved in any less restrictive manner,’” and looked at the absence of evidence that the Commonwealth could protect against fraud through proper statutory procedures. In this case, there is a similar lack of evidence that 20 days is necessary to verify voters’ constitutional eligibility to cast ballots and to conduct an orderly election. Moreover, as Cepulonis, 389 Mass. at 935, states, the Commonwealth bears the burden of establishing the necessary facts.

In any event, the Legislature has sent mixed messages on the necessity question. In G. L. c. 51, § 1F, it presumably found sound reason – perhaps a necessity in 1993 – for a 20-day deadline, although no express finding, report, or other legislative history says so. In 1993, there was no statewide voter data base to consider. The early voting authorized by G. L. c. 54, § 25B(c), on the other hand, reflects at least as strong a legislative determination that registration of all eligible voters (with exceptions for specially qualified voters) is possible five days before voting by any registered voter who wishes to cast a ballot. The Legislature has also authorized late registration of Specially Qualified Voters and acceptance of provisional ballots, acknowledging that at least some registration activity, or verifications, may occur on or immediately before election day.

Particularly given the conflicting assumptions of the 20-day deadline and the early voting system, and in the absence of any task force or report,<sup>9</sup> the Court cannot find any sufficiently clear or consistent legislative determination of, or support for, a finding that the 20-day deadline is necessary within the meaning of Kinneen.

## II.

The parties have principally argued this case under broader tests, applicable to elections legislation generally. In applying these tests, they agree that the right to vote is fundamental. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 196 (1983). The parties nevertheless disagree about which test applies. That disagreement leads to crucial differences in how they view the scope of the Commonwealth's burden to justify regulation of indisputably qualified voters. Resolution of that dispute is outcome-determinative under the parties' broader tests. For the sake of completeness, the Court addresses the issues under these alternative tests, even though they presume a legislative power that this Court concludes does not exist.

### A.

The plaintiffs urge strict scrutiny of the 20-day deadline. Strict judicial scrutiny applies "[w]here a statute implicates a fundamental right." Goodridge v. Dep't of Public Health, 440 Mass. 309, 330 (2003). The parties agree upon the first step of the analysis, namely that the right to vote is "fundamental." To do justice to the importance of the right to vote, however, a few observations beyond that stipulation are warranted.

Fundamental rights are those that "stem explicitly from or are implicitly guaranteed by the Constitution." LaCava v. Lucander, 58 Mass. App. Ct. 527, 533 (2003). Cf. Gillespie v. City of Northampton, 460 Mass. 148, 154 (2011) (listing implicit fundamental rights

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<sup>9</sup> The Legislature directed an Elections Task Force to study elections issues. Had that task force convened, it might have generated highly relevant and useful information.

“proclaimed to be paradigmatically fundamental,” such as the right to travel, freedom from physical restraint, and parental rights to care for children). Strict scrutiny thus applies to content regulation of political speech. Commonwealth v. Lucas, 472 Mass. 387, 396 (2015). In that context, the Supreme Judicial Court has said that the “Legislature has the power to regulate elections in order to prevent bribery, fraud and corruption to the end that the people’s right to vote may be protected. . . . But such regulation must be narrowly drawn to meet the precise evil sought to be curbed.” First Nat’l Bank of Boston v. Attorney General, 362 Mass. 570, 587 (1972).

Arguably, the right to vote is the most fundamental of all. It is “the ‘preservative of all rights.’” See Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth, 375 Mass. 85, 94 (1978), quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). Many other constitutional rights exist, in substantial part, to serve, support and enhance the right to vote.<sup>10</sup> Given the great degree of authority entrusted to the government, often the only remedy for the people is through the ballot box. Changing voter qualifications potentially changes democratic outcomes and certainly affects the reality and appearance of participation. The right to vote could not be more central to a democracy.

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<sup>10</sup> “Expression in the electoral context is ‘at the heart of the First Amendment’s protection.’ The ballot itself partakes of this protection as representing the culmination of the electoral process.” Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 272 n.9 (1981), quoting First Nat’l Bank of Boston, 435 U.S. at 776. See also First Nat’l Bank of Boston v. Attorney General, 362 Mass. 570, 589-590 (1972) (corporations have a first amendment right to political speech in part because “[t]he exercise of an informed vote by the electorate is essential to the freedom of elections.”).

There is also a strong relationship between the right to vote and the rights to free speech, education and return of public officers to private life. See MASS. CONST., Part II, art. V, § 2 (Commonwealth’s duty to provide an education); McDuffy, 415 Mass. at 606 (“ . . . this duty [to cherish education] is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.”); MASS. CONST., Decl. of Rts., art. VIII (Rotation in Office, granting the people the right “to cause their public officers to return to private life”).

The Commonwealth opposes strict scrutiny here, arguing that it is not enough to show impairment of a fundamental right. It cites case law in the ballot access context, primarily under federal law, which “requires that a ‘heavy’ or ‘severe’ burden withstand strict scrutiny, but reasonable, nondiscriminatory restrictions need be justified only by legitimate regulatory interests under rational basis review.” Comm. Mem. at 6, citing Barr v. Galvin, 626 F.3d 99, 109 (1st Cir. 2010). See also Libertarian Ass’n of Massachusetts v. Secretary of the Commonwealth, 462 Mass. 538, 560 (2012) (“LAM”). The Commonwealth deems “not severe” the registration cutoff’s denial of a constitutionally qualified citizen’s right to vote in a particular election.

The Commonwealth cites no Massachusetts case holding that strict scrutiny vanishes upon a finding that denial of a qualified citizen’s voting rights is less than “severe.” In Cepulonis, 389 Mass. at 935, the Supreme Judicial Court said nothing about limiting strict scrutiny to “severe” restrictions of voting rights. The Commonwealth’s test – derived from ballot access cases under art. IX -- uses “a sliding scale,” when the Commonwealth defends the constitutionality of a state impinging on fundamental rights. Comm. Mem. at 6-7, citing Barr, 626 F.3d at 109 and LAM, 462 Mass. at 560. The Supreme Judicial Court has not used this test to assess statutory voter qualifications not listed in art. III. See also Gillespie, 460 Mass. at 153 (strict scrutiny applies “[w]here a statute unjustifiably burdens the exercise of a fundamental right protected by art. 10 of the Massachusetts Declaration of Rights . . .”).

The Commonwealth cites no registration deadline case on this point and therefore fails to take account of art. III’s plain language, as explained in Kinneen. While it does cite federal authority, that body of law provides no close analogy. The federal government sets no voter qualifications.<sup>11</sup> Each state determines voter qualifications, exercising its independent sovereign

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<sup>11</sup> As noted in Simmons, 575 F.3d at 31-32:

authority. No need to reconcile constitutional voter qualifications with implied legislative authority to increase such qualifications therefore arises under federal law. Moreover, ballot access requires legislative action on numerous matters not addressed in the Massachusetts Constitution, which does not say which candidates shall be entitled to appear on the ballot. The Commonwealth's cited authority thus does not address the key features of the constitutional question in this case.

Moreover, if applied to art. III rights, the Commonwealth's test has serious flaws. In the interest of avoiding judicial "policy choices," the Commonwealth asks the Court to make a subjective and unquantifiable judgment -- how severe a burden a voter suffers when denied the right to vote because of the 20-day deadline -- an assessment that may differ greatly depending upon one's point of view and life experiences. The Commonwealth's position just substitutes one value judgment for another. The Court does not see that this approach promotes constitutional goals, including separation of powers, or advances the objectivity of adjudications.

For example, the Commonwealth implicitly makes normative judgments on the validity of qualified citizens' actions or decisions regarding registration. See Comm. Mem. at 12-13. To be sure, citizens like the plaintiffs had the opportunity to register well in advance of the election - which, for many (although not all) people is not difficult. But people may not register by the deadline for reasons having nothing to do with neglect. Citizens who came of age in the digital

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"[T]he Constitution 'does not confer the right of suffrage upon any one.'" Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 ... (1982) ... ; see also U.S. Const. art. I, § 4; *id.* amend. XIV, § 2; Bush v. Gore, 531 U.S. 98, 104 ... (2000) (per curiam) ('The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.').

The criteria for eligibility to vote are defined by the states, subject to certain federal restrictions, such as the federal constitutional prohibition on exclusion from the franchise on the basis of race, sex, or payment of a poll tax. 'No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices.' Oregon v. Mitchell, 400 U.S. 112, 125 ... (1970).



era may expect that, with current technology, registration deadlines can and therefore would be closer to the election. Others may need to attend to other more pressing or immediate matters until the deadline passes. Still others may realize only late in the campaign that the election does matter to them. There can be thousands of reasons why a citizen tries to register only after the registration cutoff. Implicit in the Commonwealth's "severity" argument is that the Court should consider these people to be, in some sense, at fault – or, perhaps, that the government should not be held responsible for denying them the right to vote as long as the executive branch makes vigorous efforts to promote, publicize and facilitate voter registration (as it clearly has). Cf. id at 12. ("The plaintiffs suggest that that voters may be unaware of the registration requirement and/or the registration deadline. If so, it does not come about because of an absence of publicity.").

Nothing in the Constitution's grant of the right to vote, as construed in Kinneen, turns on such governmental judgments about whether qualified voters have put enough effort into registering at the time when the government says they must. The voters pass judgment on elected officials, not the other way around. The Constitution provides:

Art. VIII Rotation in Office

In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.

The Constitution thus protects against the "oppress[ion]" by a governing class. That protection is defeated if incumbents may take actions to perpetuate their tenure, even unintentionally or through inertia, let alone to preserve the status quo that elected them. In particular, incumbents undermine democracy if they can influence which qualified voters may vote to reelect them, and which may not. Read as a whole, arts. III, VIII and IX of the

Massachusetts Constitution do not allow elected officials to cull the electorate itself, except through statutes that are truly necessary to ensure the correctness of the voter list and integrity of the election itself.

It is enough to note that the Constitution itself already makes the necessary judgment. Art. III lists qualifications that, if met, “entitle[]” a citizen to vote, whether or not the government believes that denial of that right imposes no severe burden. “Any legislation by which the exercise of his rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary . . . .” Kinneen, 144 Mass. at 499. Only by applying strict scrutiny to all denials of voting rights can the courts avoid making value judgments about such a fundamental right.

#### B.

The 20-day deadline does not survive strict scrutiny. “[W]hen it defends the constitutionality of a statute impinging on fundamental rights, ‘the State must demonstrate affirmatively that the challenged provision promotes a compelling State interest which could not be achieved in any less restrictive manner’ . . . .” Cepulonis, 389 Mass. at 935 (holding unconstitutional certain statutory restrictions upon voter registration of prison inmates), quoting Massachusetts Pub. Interest Research Group, 375 Mass. at 93.

In part I.B, above, the Court found that the registration cutoff is not necessary to ensure voter qualifications or conduct an orderly election. A shorter deadline, election day registration, and same day registration are all possible alternatives. Keeping the 20-day deadline, in combination with election day or same day registration is also possible.

It may be that, under strict scrutiny, the need to ensure accuracy of registrations and to conduct an orderly election is the only “compelling state interest” that the Court may consider. If so, then the necessity test and strict scrutiny are virtually the same. Consistent with that

conclusion, in Cepulonis, 389 Mass. at 935-936, the Commonwealth apparently argued (and the Court considered) only the "Commonwealth's interest in preventing voter fraud."<sup>12</sup>

The additional state interests cited by the Commonwealth are not compelling. It urges:

[T]he minimal burden imposed on the voter with respect to registration serves the important state interest in having an efficiently run, secure election. . . . A period of less than three weeks in which voters may not register for the forthcoming election permits local election officials to process remaining registration applications in a timely fashion. That includes reviewing the application for accuracy and completeness, as well as confirming the existence and validity of the applicant's address. Additionally, voter registration applications which are postmarked on or before the deadline are still valid and therefore time for transmittal through the mail is necessary. This process is followed by the sending of appropriate notices either allowing or denying registration (with reasons, if the latter).

This all takes place at a time when local election officials are under considerable pressure to organize and administer the election itself. Voter lists must be printed and materials packaged for polling places. Poll workers must be trained. Surprises emerge. . . .

Comm. Mem. at 13. Missing from this passage is any evidence that 20 days are necessary to achieve accuracy or security. Indeed, the quoted passage from the Commonwealth's memorandum does not attempt to demonstrate a "compelling state interest." It only seeks to justify the registration cutoff as "rational." Id.

Efficiency is a legitimate state interest, but the Commonwealth cites no authority holding that efficient administration justifies impairment of a fundamental right. There is no question that local election officials perform under considerable pressure at election time, but their

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<sup>12</sup> In a First Amendment case, First Nat'l Bank of Boston, 435 U.S. at 788-789, the United States Supreme Court stated:

Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" [FN omitted] are interests of the highest importance. Buckley v. Valeo, 424 U.S. 1 (1976)); United States v. Automobile Workers, 352 U.S. 567, 570 (1957); United States v. CIO, 335 U.S. 106, 139 (1948) (Rutledge, J., concurring); Burroughs v. United States, 290 U.S. 534 (1934). Preservation of the individual citizen's confidence in government is equally important. Buckley, supra, at 27; CSC v. Letter Carriers, 413 U.S. 548, 565 (1973).

testimony in this case reflects their admirable commitment that (to paraphrase) “if the law requires it, they will get it done.” No evidence suggests that they will fail, even if the registration cutoff is reduced, early voting is implemented, or other changes discussed in this case occur.

Even if any of these interests were “compelling,” there are less restrictive ways to achieve them. Massachusetts’ own experience with a five-day period between registration and early voting is one example of a feasible, shorter registration cutoff. Another alternative would be to change the computer program that deletes late-registrants from VRIS, even though their registrations were certified in time to be printed in the election day voter lists.

The experience of other states shows many less restrictive alternatives. Appendix A to this Memorandum displays the parties’ multistate survey of election registration deadlines, with some adjustment to reflect the Court’s resolution of disputes. That survey includes states without EDR, as well as in states that allow EDR. About 14 states have election-day registration. Some others have deadlines shorter than 20 days.<sup>13</sup> To be sure, other states have longer deadlines, some of which the federal courts have approved over the decades. The experience of other states as a whole nevertheless suggests that, in the absence of some reason not shown in the record of this case, a less restrictive approach exists. Here, as in Cepulonis, 389 Mass. at 935-936, there is “no evidence that a statutory procedure could not be enacted which would guard against voter fraud while permitting” qualified citizens to cast ballots even though they did not register at least 20 days before the election.

The Court concludes that the Commonwealth has shown no real reason, grounded in data, facts or expert opinion, why election officials need to close registration almost 3 weeks before

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<sup>13</sup> Even a case cited by the defendants involved upholding a seven-day deadline in Connecticut against a federal equal protection challenge. ACORN v. Bysiewicz, 413 F. Supp. 2d 119, 141-149 (D. Conn. 2005).

the election to do their job.<sup>14</sup> Instead, the plaintiffs have shown that there is no compelling reason for a 20-day deadline that deprives individual citizens of their right to vote.

C.

The Commonwealth proposes a sliding-scale test that weighs the burden on the voter against the state's interest in voting regulations. It argues that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." Comm. Mem. at 4, citing Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). See also Clingman v. Beaver, 544 U.S. 581, 586-587 (2005). According to the Commonwealth, "the greater the burden on the voter, the greater must be the persuasiveness of the State's justification, which is another way of saying that the State must act reasonably given the significance of its objectives." Comm. Mem. at 5, citing Anderson, 460 U.S. at 789; Burdick v. Takushi, 504 U.S. 428, 443-444 (1992); Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 213-214 (1986).

Once again, these federal cases arise in the ballot access context, rather than in a dispute over the right of voters to vote. See also Langone, 388 Mass. 185, 196-197 (weighing the severity of the burden upon voters' rights resulting from restrictions on candidates' ballot access rights). The Commonwealth responds that the same test applies under the Massachusetts and United States constitutions, because the Supreme Judicial Court has declined to extend article IX beyond federal protections. LAM, 462 Mass. at 558 ("Art. [IX] does not extend any protections beyond the Federal constitutional requirements."). The conclusion does not follow from the premise. As noted above, the plaintiffs have grounded their arguments primarily in art. III, which contains an affirmative grant of voting rights to qualified citizens and therefore raises

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<sup>14</sup> Ideally, a justification under the strict scrutiny test would quantify the time needed to accomplish the various tasks, but the evidence does not even prove qualitatively that a 20-day period is required and that only a prohibition on voting by those registered thereafter can serve the Commonwealth's compelling interests.

entirely different issues from ballot access legislation or federal constitutional interpretation. In claiming that the Supreme Judicial Court has ruled out strict scrutiny in voter deadline cases, the Commonwealth reads too much into the LAM decision. In truth, the Supreme Judicial Court has not spoken on the issue.

Even under the LAM sliding scale test, imposition of a voter qualification that denies qualified citizens the right to vote in a particular election -- in the absence of necessity -- is "severe" enough to warrant strict scrutiny. As noted above, postponement of the right to vote has long been considered a serious and unconstitutional deprivation. Kinneen, 144 Mass. at 499. The 20-day deadline completely and irrevocably prohibits some qualified voters from casting a ballot in a particular election. That election will never occur again. "An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice." See Bachrach v. Secretary of the Commonwealth, 382 Mass. 268, 272 (1981) (emphasis added) (prohibition on a candidate describing himself on the ballot as an "independent" violates free speech).

It is no answer to say that the qualified citizen will be able to vote in future elections.<sup>15</sup> No one could reasonably suggest that, for instance, a ban on political speech 20 days before an election would impose only a "light" burden on speech because the ban expired after the

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<sup>15</sup> The Commonwealth argues that the Cepulonis test applies only when, like the prohibition on inmate registration, a law so affects a fundamental right "that it cannot be exercised or is significantly burdened" and that the 20-day deadline "only" disenfranchises a voter for one election cycle. It notes that in Cepulonis, 389 Mass. at 937, the Court distinguished Rosario v. Rockefeller, 410 U.S. 752 (1973) on the ground that:

There the plaintiffs failed to register before a statutory deadline and could not vote in the next primary. The time limit in that case did not absolutely disenfranchise voters or deprive them of the right to vote for a lengthy period. *Id.* at 757. Cf. Kusper v. Pontikes, 414 U.S. 51 (1973) (twenty-three month period before a person could change party affiliation held too restrictive and hence unconstitutional).

Distinguishing a federal case, of course, does not resolve the question of what the Court would do if a future lawsuit squarely presented a question under the state constitution.

election, when the message no longer could have its intended effect. Cf. First Nat'l Bank of Boston, 362 Mass. at 590 (invalidating ban on corporate speech that is not narrowly drawn); see generally First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (even a limited ban on corporate speech fails strict scrutiny and violates the First Amendment).<sup>16</sup> An equivalent delay in the fundamental democratic act of casting a ballot imposes just as heavy a burden – indeed, casting a ballot is speech. See Bachrach, 382 Mass. at 272, quoted above. A citizen votes on the particular candidates and issues on the ballot at the time(s) set for the election, or not at all, and it is no answer that the citizen may vote on new candidates and new issues years later. Compare Langone, 388 Mass. at 197-198 (voters may still vote for a candidate who fails to qualify for a party primary if that candidate runs as an independent in the same election).

Moreover, the 20-day deadline affects thousands of otherwise qualified citizens' right to vote. To assess the severity of the registration cutoff's impact, therefore, the burden on each voter must be multiplied thousands of times. For instance, in 2016, 5,500 voters whose registrations were certified before the November 8 election could not vote simply because they applied for registration fewer than 20 days before the election, resulting in deletion of their names from the final voter list. While even a single denial of a qualified citizen's right to vote ought to qualify as severe, the aggregate impact upon thousands of citizens in a single federal or statewide election is even more compellingly "severe" for purposes of applying strict scrutiny.

In previous sections of this Memorandum, the Court has already found lack of necessity, absence of compelling interests and availability of less restrictive alternatives. Under the "sliding-scale test," therefore, the severe burden imposed by the 20-day rule is unconstitutional.

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<sup>16</sup> See generally T & D Video, Inc. v. Revere, 423 Mass. 577, 580-581 (1996) (time place and manner regulations must "not unreasonably limit alternative avenues of communication"), quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986). In elections, of course, there is no other time, place or manner.

**D.**

For the sake of completeness, the Court addresses the Commonwealth's proposed inquiry, namely that "the question is only whether the requirement that registration be completed twenty days before the election is rational." Comm. Mem. at 13. Under the rational basis test, the Court would uphold the 20-day deadline.

The state's interest in efficiency and reducing the pressure upon local officials is certainly legitimate, even if not compelling. Although proof is lacking, the Legislature could rationally assume that alternatives to the registration cutoff may have some uncertain consequences, could reduce efficiency and increase burdens on local officials. The rational basis test does not require the Commonwealth to prove that any of these concerns are substantial or compelling when measured against fundamental rights, or that less restrictive alternatives do not exist. Indeed, the plaintiffs correctly do not attempt to argue that the 20-day deadline fails the bare rationality test.

The defendants have also pointed out the extensive voter registration information and opportunities made available to the public well before October 19. The conscientious efforts of the Commonwealth's legislative and executive branches to inform and register voters by the deadline may well have legal significance, if the 20-day deadline need only pass minimal scrutiny. The record documents the extensive efforts of the Secretary of the Commonwealth to publicize virtually all significant aspects of the registration process, and the candidates and questions on each ballot, well before the election, in many way, in several languages. If, through these measures, the burden upon the right to vote can be mitigated sufficiently to justify minimal scrutiny, then the Commonwealth has offered a sufficient theoretical justification for the challenged laws.

Because the 20-day deadline may well make elections administration easier or more convenient, it would survive rational basis scrutiny even though it is not actually necessary to



avoid fraud, ensure accuracy or prevent disorderly elections. In the end, therefore, this case turns on application of strict scrutiny to the denial of the fundamental right to vote.

### III. RELIEF

That leaves the question of relief. Since this Court's decision will be reviewed de novo on appeal, there is, strictly speaking, no legal requirement to enter any relief at all. Finding all the material facts and reporting them to the Appeals Court for determination of the issues would be enough. Mass. R. Civ. P. 64.<sup>17</sup> Still, there may be benefits to a decision by this Court.<sup>18</sup> In any event, there is little downside to a trial court decision on the issues at this time.

In particular, the Court does not order a specific voter registration deadline, require early voting, mandate changes to the Commonwealth's computer program or specify any other final resolution of the significant policy issues at stake. Even the Supreme Judicial Court has refrained from doing so, when time for legislative action remained:

We refrain from ordering affirmative relief. Legislation providing for an absentee registration process 'is primarily a matter for legislative consideration and determination, and ... judicial relief becomes appropriate only when a legislature fails to [provide that process] according to [State] constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' Reynolds v. Sims, 377 U.S. 533, 586 (1964).

Cepulonis, 389 Mass. at 937-938.

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<sup>17</sup> Indeed, in this constitutional case with large numbers of stipulated facts, it is not even clear that the trial court's findings of fact should receive deferential review. Compare Hancock v. Department of Education, 443 Mass. 428, 433 (2005) (Marshall, C.J.) (giving "great deference" to the trial judge's findings of fact, but not the ultimate conclusions regarding constitutionality) with Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 431 (2001) (de novo appellate review of fact issues pertaining to constitutional claim); Boston Teachers Union v. School Comm. of Boston, 370 Mass. 455, 468 n.9 (1976) (de novo review of trial judge's conclusions based on stipulated facts); see generally Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) (de novo review of determinations of actual malice in defamation cases).

<sup>18</sup> For one thing, a decision may assist in determining whether, when and how legislative action might occur, or how appellate review should proceed. For another, given the important and novel constitutional issues at stake, a decision may help to air the issues in some small measure, providing the type of "percolation" that the United States Supreme Court often desires before deciding that an issue is ripe for review and decision by a court of last resort. Cf. Arizona v. Evans, 514 U.S. 1, 23 n.1 (1995) (Ginsberg, J., dissenting).

Even a limited scope of relief does present a question of severability, which the parties do not discuss, for reasons that are entirely understandable. Art. III, by its terms, is limited to elections for “governor, lieutenant governor, senators and representatives.” Art. IX applies more broadly, but does not specify voter qualifications, and may therefore require different analysis. Moreover, G. L. c. 51, § 1F applies only to “an election at which electors of president and vice-president are to be chosen.” In theory, it would be possible to find some or all of G. L. c. 51, §§ 1, 1F, 26 and 34 constitutional, while invalidating only those provisions that directly conflict with art. III. Such distinctions, however, have only theoretical significance. Applying them to the existing election statutes would cause practical problems, not the least of which would be the confusion and logistical difficulties in allowing a voter to vote for some candidates but not others in a single election, or to vote in some elections but not others.

The parties do not draw a distinction between the elections mentioned in art. III (or in c. 51, § 1F) and contests for other offices. Given the insurmountable practical problems with having two sets of voter qualifications for “different elections” on the same election day, there is no realistic possibility that the Legislature would deem it wise to have two sets of voter qualifications, depending on the nature of the election. On the question of voter qualifications, G. L. c. 51, §§ 1, 1F, 26 and 34 are not severable and stand or fall as a whole. See generally Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 672-673 (2013) (discussing severability principles). The Court will therefore not distinguish between candidates or elections in granting relief.

The Court therefore declares that it is unconstitutional to deny an otherwise qualified voter the right to vote on the ground that the voter did not register at least twenty days before the election and that G. L. c. 51, §§ 1, 1F, 26 and 34 are unconstitutional to the extent that they

require such denial. There is no need for additional relief at this point, particularly where there is ample time for legislative action and appellate review. Moreover, there is a strong presumption that public officials will comply with the law, once declared by a Court. See e.g. LaChance v. Commissioner of Correction, 475 Mass. 757, 765 (2016); Bates v. Director of the Office of Campaign & Political Finance, 436 Mass. 144, 179 (2002) (“The presumption exists that the Commonwealth will honor its obligations.” (citation omitted)).

### ORDER

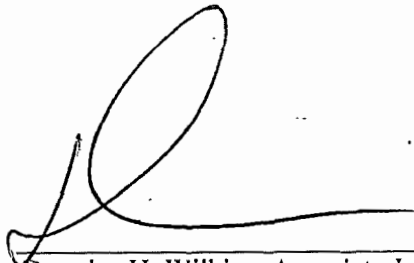
After trial, the COURT DECLARES THAT:

1. It is unconstitutional to deny the right to vote to a citizen who meets the qualifications of MASS. CONST. art. III on the ground that the voter did not register at least twenty days before the election.

2. G. L. c. 51, §§ 1, 1F, 26 and 34 are unconstitutional to the extent that their 20-day deadline operates to deny constitutionally qualified voters the right to cast a ballot.

FINAL JUDGMENT SHALL ENTER, BUT SHALL BE STAYED FOR 60 DAYS AND, IF A TIMELY NOTICE OF APPEAL IS FILED, SHALL BE STAYED PENDING RESOLUTION ON APPEAL.

Dated: July 24, 2017



Douglas H. Wilkins, Associate Justice

## APPENDIX A – VOTING LAWS OF OTHER STATES

The parties have submitted the following survey of the voter registration deadlines in other states:

### A. Voting Registration Deadlines among States without EDR

439. Alabama requires voters to register at least 14 days prior to an election. ALA. CODE § 17-3-50.
440. Alaska requires voters to register at least 30 days prior to an election. ALASKA STAT. ANN. § 15.07.070.
441. Arizona requires voters to register at least 29 days before an election in order to be eligible to vote. ARIZ. REV. STAT. ANN. § 16-120.
442. Arkansas requires voters to register at least 30 days before any election. ARK. CONST. amend. LI, § 9.
443. Delaware requires voters to register no later than the fourth Saturday prior to the date of the election, but registration applications that change a registrant's name or address may be processed until the day prior to a primary or general election. DEL. CODE ANN. tit. 15, § 2036.
444. Florida requires voters to register at least 29 days before any election, but updates to a voter's name, address, and signature are permitted after the 29 day registration deadline. FLA. STAT. ANN. § 97.055.
445. Georgia requires voters to register by the close of business on the fifth Monday prior to an election. GA. CODE ANN. § 21-2-224.
446. Indiana requires voters to register at least 29 days before the next election. IND. CODE ANN. § 3-7-13-11.
447. Kansas requires voters to register at least 20 days before the next election. KAN. STAT. ANN. § 25-2311.

448. Kentucky requires voters to register by the fourth Tuesday preceding the next election.

KY. REV. STAT. ANN. § 116.045.

449. Louisiana requires voters to register at least 30 days before the next election, but may register online until 20 days before the next election. LA. STAT. ANN. § 18:135, 18:115.1.

450. Michigan requires voters to register at least 30 days before an election. MICH. COMP. LAWS ANN. § 168.497.

451. Mississippi requires voters to register at least 30 days before an election. MISS. CODE. ANN. § 23-15-11.

452. Missouri requires voters to register no later than the fourth Wednesday prior to an election. MO. ANN. STAT. § 115.135.

453. Nebraska requires voters to register on or before the second Friday before an election. NEB. REV. STAT. ANN. § 32-302.

454. Nevada requires voters to register by the fourth Tuesday before an election by mail and the third Thursday before an election in person, but Nevada also allows voters to register to vote online, if the county clerk has established an online system, by the Thursday preceding the first day of the period for early voting. NEV. REV. STAT. ANN. § 293.560.

455. New Jersey requires voters to register at least 21 days before an election. N.J. STAT. ANN. § 19:31-6.

456. New Mexico requires voters to register at least 28 days prior to the election. N.M. STAT. ANN. § 1-4-8.

457. New York requires voters to register at least 25 days prior to an election. N.Y. ELEC. LAW § 5-210.

458. North Carolina requires voters to register at least 25 days prior to the election. N.C. GEN. STAT. ANN. § 163-82.20.

459. Ohio requires voters to register at least 30 days prior to an election. OHIO REV. CODE ANN. § 3503.19

460. Oklahoma requires voters to register at least 25 days prior to an election. OKLA. STAT. ANN. tit. 26, § 4-110.1

461. Oregon requires voters to register at least 21 days before election day. OR. REV. STAT. ANN. § 247.025.

462. Pennsylvania requires voters to register at least 30 days before the election. 25 PA. CONS. STAT. ANN. § 1326.

463. Rhode Island requires voters to register at least 30 days prior to an election. R.I. GEN. LAWS ANN. § 17-1-3.

464. South Carolina requires voters to register at least 30 days prior to an election. S.C. CODE ANN. § 7-5-150.

465. South Dakota requires voters to register at least 15 days before any election. S.D. CODIFIED LAWS § 12-4-5.

466. Tennessee requires voters to register at least 30 days before the election. TENN. CODE ANN. § 2-2-109.

467. Texas requires voters to register at least 30 days before the election. TEX. ELEC. CODE ANN. § 13.143.

468. Utah requires voters to register at least 30 days before the election, but may register in-person and online until 7 days before the election. UTAH CODE ANN. §§ 20A-2-102.5, 20A-2-201, 20A-2-206.

469. Virginia requires voters to register at least 22 days before the election. VA. CODE ANN. § 24.2-416.

470. Washington requires voters to register at least 29 days before an election by mail and at least 8 days before an election in person. WASH. REV. CODE ANN. § 29A.08.140.

471. West Virginia requires voters to register at least 21 days before the election. W. VA. CODE ANN. § 3-2-6.

#### **B. Voting Registration Deadlines among States with EDR**

472. Outside of Election Day Registration, California requires voters to register at least 15 days before the election. CAL. ELEC. CODE. § 2102.

473. Outside of Election Day Registration, Colorado requires voters to register at least 22 days before the election, but voters may register in-person up through election day, and online or by mail through the eighth day prior to an election. COLO. REV. STAT. ANN. § 1-2-201.

474. Outside of Election Day Registration, Connecticut requires voters to register at least 7 days before the election. CONN. GEN. STAT. ANN. § 9-17.

475. Outside of Election Day Registration, the District of Columbia requires voters to register by mail or by digital service at least 30 days before an election but voters may register by for in-person voter registration after the 30-day mail-in registration deadline. D.C. CODE § 1-1001.07(g)(4).

476. Outside of Election Day Registration, Hawaii requires voters to register at least 30 days before an election. HAW. REV. STAT. § 11-24.

477. Outside of Election Day Registration, Idaho requires voters to register at least 24 days before an election. IDAHO CODE REV. § 34-408.

478. Outside of Election Day Registration, Illinois requires voters to register at least 28 days before an election. 10 ILL. COMP. STAT. ANN. 5/5-5.



479. Outside of Election Day Registration, Iowa requires voters to register at least 10 days before an election. IOWA CODE ANN. § 48A.9.
480. Outside of Election Day Registration, Maryland requires voters to register at least 21 days before an election. MD. CODE ANN., ELEC. LAW § 3-302.
481. Outside of Election Day Registration, Minnesota requires voters to register at least 21 days before an election. MINN. STAT. ANN. § 201.061.
482. Outside of Election Day Registration, Montana requires voters to register at least 30 days before an election, but Montana allows for late registration in person after the close of regular registration. MONT. CODE ANN. §§ 13-2-301, 13-2-304.
483. Outside of Election Day Registration, New Hampshire requires voters to register before the last meeting of the supervisors of the checklist. N.H. REV. STAT. ANN. § 654:8.
484. Outside of Election Day Registration, Vermont requires voters to register at least 1 day before an election. VT. STAT. ANN. tit. 17, § 2144.
485. Outside of Election Day Registration, Wisconsin requires voters to register by the third Wednesday before the election, but Wisconsin allows for late registration in person until 5 p.m. on the Friday before an election. WISC. STAT. ANN. §§ 6.28, 6.29.



## **APPENDIX B – OTHER STATES' LAWS REGARDING AUTOMATIC VOTING AND VOTER IDENTIFICATION**

The parties have submitted the following survey of the automatic voting and voter identification laws in other states:

### **States with Automatic Voter Registration**

490. In Alaska, when an unregistered voter completes an application for a permanent fund dividend, they are automatically-registered to vote. ALASKA STAT. ANN. § 15.07.050.

491. In California, when an unregistered voter completes an application for a driver's license, that application will be sufficient to constitute a completed affidavit of voter registration subject to their opting out of the program or ineligibility to vote. CAL. ELEC. CODE. § 2265.

492. In the District of Columbia, a DMV application will automatically serve as a voter registration application unless the applicant fails to sign the designated portion of the application. D.C. CODE § 1-1001.07.

493. In Oregon, the Secretary of State, operating with information from the Department of Transportation, gives potential voters the option to opt-out of registration, if they do not, their record from the Department of Transportation constitutes a completed voter registration card. OR. REV. STAT. ANN. § 247.017.

494. In Vermont, an application for a driver's license serves simultaneously as an application to vote unless the applicant declines to sign the designated portion of the application. VT. STAT. ANN. tit. 17, § 2145a.

495. In West Virginia, unless the applicant for a license at the Division of Motor Vehicles affirmatively declines to be registered to vote, the Division will forward the applicant's records to the Secretary of State to process the newly registered voter. W. VA. CODE ANN. § 3-2-11.

### Process for Verification in Selected States with EDR

486. In New Hampshire, in order to register to vote on an election day, a voter must supply a birth certificate, passport, naturalized citizenship papers, or a qualified voter affidavit, "any other reasonable documentation which indicates the applicant is a United States Citizen" along with any reasonable documentation that indicates domicile and age or affidavit. N.H. REV. STAT. ANN. § 654:12.

488. In New Hampshire, if voters do not identify themselves with photo identification, the Secretary of State's office sends the provided address a letter of identity verification. N.H. REV. STAT. ANN. § 654:12. If the individual at the address did not in fact vote, they are encouraged to contact the Attorney General. N.H. REV. STAT. ANN. § 654:12.

487. In Wisconsin, in order to register to vote on an election day, a voter must prove residence with [, among other acceptable documents pursuant to WISC. STAT. ANN. § 6.34,] a driver's license, a current and valid identification card, an official card issued by an employer that contains a photograph, a real property tax bill, a residential lease, a utility bill, a bank statement, a paycheck, a check or other document issued by a unit of government. WISC. STAT. ANN. § 6.55.

489. In Wisconsin, the municipal clerk performs an audit to ensure that a voter has not voted more than once. WISC. STAT. ANN. § 6.56. If the clerk has good reason to believe a voter has voted more than once, the clerk notifies the appropriate county's district attorney. WISC. STAT. ANN. § 6.56.

**APPENDIX C**  
**UNDISPUTED FACTS REGARDING THE PLAINTIFFS AND DEFENDANTS**

**A. PLAINTIFFS**

*Edma Ortiz*

93. Plaintiff Edma Ortiz was born in Puerto Rico in 1967.

94. Ms. Ortiz moved to Chelsea, Massachusetts in 2009 and currently resides in Chelsea.

95. Ms. Ortiz is not now, and was not at any time relevant to the November 2016 election, incarcerated, under guardianship, an active member of the United States armed forces or merchant marine, or a spouse or dependent of such a person. She has never been disqualified from voting because of corrupt practices involving elections.

96. Ms. Ortiz wanted to vote in the November 2016 election because the immigration and Latino rights at stake were very important to her.

97. Her sense of urgency about the issues increased as the election drew closer.

99. Throughout the fall of 2016, Ms. Ortiz had an irregular work schedule. She did not have a permanent job, and instead worked part-time, temporary positions that often gave her limited notice of available shifts. When she was not working, she was looking for permanent employment.

100. In addition, on October 5, 2016, Ms. Ortiz unexpectedly went to Puerto Rico due to her mother's death. She stayed in Puerto Rico until October 19, 2016.

101. Ms. Ortiz's return flight was scheduled to arrive in Boston around 6:30 pm on October 19, 2016. However, the flight took off late due to rain and did not land until after 10 pm.

102. Ms. Ortiz was unaware that the Massachusetts voter registration deadline for the November 8, 2016 election was October 19, 2016. On October 20, 2016, Ms. Ortiz went to the Chelsea Collaborative to register to vote, but she was told that the voter registration deadline had passed.



103. Ms. Ortiz was disappointed when she learned she had missed the deadline.

104. She had thought that she would be able to register closer in time to the election in a place like Massachusetts, particularly because she believed she had previously registered to vote on the day before an election in Puerto Rico.

105. On October 29, 2016, Ms. Ortiz submitted her voter registration form at City Hall in Chelsea, Massachusetts.

107. Ms. Ortiz has been a member of the Chelsea Collaborative since 2013.

108. Ms. Ortiz became a dues paying member of the Chelsea Collaborative about a year ago.

433. Plaintiff Edma Ortiz had the intention to register to vote from the time she moved to Massachusetts in 2009 but did not take any concrete steps to register until October 2016.

434. . . . At one point before the 2012 election, she was advised to go to the post office, but she did not. The Chelsea Collaborative office is located adjacent to the post office. Ortiz has been a [dues-paying] member of Chelsea Collaborative [for about a year].

436. Ortiz is on MassHealth and has an EBT card. . . . She regularly visits the post office to mail things to her daughter in PR and has previously purchased postage stamps.

437. When Ortiz ultimately registered to vote at Chelsea City Hall on October 29, 2016, it took just a few minutes, and she did not have any problems with the form that the counter clerk could not help her with.

*Rafael Sanchez*

109. Plaintiff Rafael Sanchez was born in Puerto Rico in 1944.

110. Mr. Sanchez moved to Massachusetts in 1964, and has lived in Somerville since 2005.

111. Mr. Sanchez is not now, and was not at any time relevant to the November 2016 election, incarcerated, under guardianship, an active member of the United States armed forces or

merchant marine, or a spouse or dependent of such a person. He has never been disqualified from voting because of corrupt practices involving elections.

112. Mr. Sanchez typically has not voted because he believes that government officials often make promises that they do not keep.

117. On October 20, 2016, after Mr. Sanchez learned that he had missed the [20-day deadline], he filled out a voter registration form at Chelsea Collaborative, which was mailed to the City Hall in Somerville, Massachusetts.

572. Sanchez completed a voter registration form at a table outside Chelsea Collaborative on October 20, 2016, one day past the voter registration deadline.

118. Mr. Sanchez believed the November 2016 election was extremely important and was very disappointed to learn that he would not be able to vote because of the [20-day deadline].

573. That was not the first occasion on which he had seen a voter registration table outside of Chelsea Collaborative; he had seen a table 1 to 3 days prior – at which point the registration deadline had not passed – but did not stop to register then because he was late to pick up his grandson.

113. Mr. Sanchez decided that he wanted to vote in the November 2016 election because he became concerned about discrimination against Latinos and undocumented immigrants.

114. At first, Mr. Sanchez was going to let other people decide the outcome of the election. However, he learned more about the candidates and their positions as it got closer to the election, and ultimately decided that he needed to vote to help protect the rights of Latinos and undocumented immigrants.

115. Mr. Sanchez was unaware of the registration cutoff and first learned about it when he picked up his grandson at daycare—right next to the Chelsea Collaborative—the day after the deadline had passed.

119. Mr. Sanchez was allowed to vote in the November 8, 2016 election by order of this Court.

421. Rafael Sanchez has lived at 35 Otis Street, Somerville, MA since 2005.

422. Prior to that time, he resided in Cambridge.

423. Sanchez was previously registered to vote in Cambridge, and voted [once] in Cambridge.

425. Sanchez voted only once in Cambridge, because [until the November 2016 election,] he's "never been very close to politics. To me one party or any party is the same. They talk a lot and they do very little."

424. Sanchez's wife registered to vote in Cambridge at the same time that Sanchez registered.

426. Sanchez did not vote again until he voted in the November 2016 election.

427. Sanchez has renewed his Massachusetts driver's license every four years, and recalls being asked at his last renewal, in 2012, whether he wanted to register to vote.

430. Sanchez subsequently filled out a registration form at a similar table but was told that it was too late but that it would be forwarded to the City of Somerville nonetheless.

431. Sanchez has never tried to register to vote but been unable to do so.

432. When Sanchez registered to vote in 2016, he did not find the form difficult to fill out. It took him only a few minutes – maybe five minutes – to complete.

#### *Chelsea Collaborative*

120. Plaintiff Chelsea Collaborative is a non-profit organization whose mission is to enhance the social, environmental, and economic health of the Chelsea community and its people. The Collaborative achieves its mission through community organizing and civic engagement.

401. Gladys Vega is the executive director of Chelsea Collaborative.

121. Chelsea Collaborative employs 9 full-time paid staff, 3 part-time organizers, and 6 part-time high school student organizers. It also employs temporary door knockers and stipend workers, and has numerous volunteers.

122. Chelsea Collaborative is a membership organization. Its members participate in leadership trainings and learn how to become community leaders. Members determine which pieces of legislation the organization will support, and also take part in an annual membership meeting and mid-year retreat to set the organization's goals and assess its progress.

123. Paying members fill out a form and pay a one-time fee of \$35.

124. An individual can become a member of Chelsea Collaborative without paying any dues or filling out any forms. Many people participate in Chelsea Collaborative activities as members without paying any dues.

125. At any given time, Chelsea Collaborative has approximately 250 members.

126. Chelsea Collaborative focuses on several project areas, including immigration, housing preservation, youth engagement, and voting rights.

402. The Chelsea Voter Initiative is a project of Chelsea Collaborative, and its voter registration, voter education, and voter mobilization efforts are one and the same as that of Chelsea Collaborative. Voter registration is [a] priority of the Chelsea Voter Initiative.

403. Chelsea Collaborative receives funding to support its voter registration activities [as well as other voter-related activities such as voter education.

404. Chelsea Collaborative receives boxes of the Information for Voters guide in English and Spanish prior to the voter registration deadline before an election.

405. Chelsea Collaborative receives deals with local radio stations to promote voter registration.

406. Members of Chelsea Collaborative are encouraged to register to vote.



407. There is a sign posted on Chelsea Collaborative's office door encouraging people to register to vote.

408. In the time period leading up to an election, the Chelsea Collaborative office manager is trained to ask people who visit the office if they want to register and to assist them in doing so.

409. Voter registration is "part of the fabric of" Chelsea Collaborative. Any time groups of members are gathered for an event, Chelsea Collaborative staff try to ask people if they are registered and encourage eligible people to register.

410. In the fall of 2016, as the voter registration deadline approached, Chelsea Collaborative collected an increasing number of voter registration forms.

413. Chelsea Collaborative held at least one voter registration event after the October 19, 2016, voter registration deadline.

414. Chelsea Collaborative has also held voter registration events after the deadline for previous elections.

415. Vega is not familiar with the term "specially qualified voters" or the fact that such persons may register to vote in an election after the voter registration deadline.

127. Chelsea Collaborative pursues voting rights through its Chelsea Voter Initiative, which has existed for over 20 years. [The Chelsea Voter Initiative's] main activities are voter registration, voter mobilization, and voter education.

128. Chelsea Collaborative is the only Chelsea-based group focused voter registration, voter education, and get-out-the vote efforts for the city of Chelsea.

129. All of Chelsea Collaborative's staff participates in voter registration.

130. Chelsea Collaborative's voter registration efforts include door knocking throughout the community, tabling in front of the Chelsea Collaborative office and at community events, and registering individuals at hot-spots such as grocery stores, bus stops, and churches.



131. More than 2 decades of experience has taught Chelsea Collaborative that there is a very limited amount of time—approximately 5 to 7 minutes—to talk to people on the street or while door knocking about voting before their attention shifts.

132. As a result, Chelsea Collaborative focuses on registering voters to the exclusion of voter education or mobilization when talking to potential voters on the street or while door knocking before the voter registration deadline.

133. In the weeks leading up to the registration deadline, Chelsea Collaborative focuses its efforts on voter registration to the exclusion of voter education and mobilization and their other priority areas of worker rights, immigrant rights and tenant rights.

134. In September 2016, Chelsea Collaborative asked four of its strongest door knockers to focus their collective 40 hours a week on voter registration. These door knockers are hourly employees with a limited number of available hours.

136. In 2016, door knockers were typically paid approximately \$11 per hour.

137. In the month leading up to the October 19, 2016 deadline, 2 full time Chelsea Collaborative staff members spent approximately 5 to 10 hours each per week on voter registration, while another full time staff member spent approximately 10 to 20 hours each week on voter registration. In addition, between 15 to 20 volunteers worked on voter registration. Finally, 2 to 3 of the stipend student workers, who earn a total of \$1,400 each, devoted a portion of their time to voter registration.

138. On the day of the registration deadline, the entire Chelsea Collaborative staff stops all of its other work to focus exclusively on voter registration.

139. Chelsea Collaborative registers between 200 and 300 voters every year.

140. Chelsea Collaborative delivers the voter registration cards it collects to the Chelsea City Hall or mails them to the appropriate location if the voter is not registering to vote in Chelsea.

141. Gladys Vega has personally registered voters and helped potential voters fill out the registration card.

142. Chelsea Collaborative's voter mobilization efforts include training young members, door knocking to remind potential voters about the upcoming elections, and talking to potential voters at hot spots such as grocery stores, bus stops, and churches.

143. Chelsea Collaborative's voter education efforts include door knocking, talking to potential voters at hot spots, and hosting forums, all to educate potential voters about candidates and important ballot issues. In 2016, Chelsea Collaborative voter education efforts focused on educating voters about the Community Preservation Act ballot question.

146. In the final two weeks before the election, Chelsea Collaborative's staff spends dozens of hours per week preparing lists for voter education and mobilization door knocking, training door knockers, and doing their own door knocking. In addition, 10 door knockers spend approximately 100 hours per week door knocking and tabling for voter education and mobilization. Volunteers also participate in door knocking and tabling.

147. In the final two weeks before the November 2016 election, Chelsea Collaborative hosted two educational forums on the Community Preservation Act and helped prepare pamphlets that were mailed to 18,000 Chelsea residents explaining the Community Preservation Act ballot question.

150. Every year, Chelsea Collaborative has to inform individuals who call for a ride to the polls that they will not be able to vote because they are not registered. In 2016, Chelsea Collaborative told 20 to 25 people on Election Day that they would not be able to vote because they were not registered.

*MassVOTE*

151. Plaintiff MassVOTE is a non-profit whose mission is to promote a culture of active political participation. MassVOTE provides civic organizations with the tools to organize, register, and educate voters, with an emphasis on historically disenfranchised communities. Those tools include civic engagement grants, voter education materials including ballot and candidate guides, and technical assistance.

416. MassVOTE's mission is as follows: "MassVOTE works to promote a culture of active political participation by providing civic organizations the tools they need to organize, register, and educate voters, with an emphasis on historically disenfranchised communities. MassVOTE builds civic coalitions to advocate for democracy reforms that make the electoral process more accountable and accessible to all people."

418. MassVOTE continued to run voter registration initiatives between the October 19, 2016 voter registration deadline and the November, 2016 election.

419. Between the September, 2016 primary election and the October 19, 2016 voter registration deadline for the general election, MassVOTE conducted both voter education and voter registration activities.

420. MassVOTE is currently supporting pending legislation to establish Automatic Voter Registration in Massachusetts, as well as legislation to establish Election-Day Registration in Massachusetts.

152. MassVOTE's grantees serve communities with significant concentrations of people of color, lower income-residents, new citizens, and students—communities that tend to be more transient than the general population.

153. MassVOTE currently has two full-time employees (an Executive Director and Youth Coordinator) and seven part-time Young Civic Leaders.

154. Everything that MassVOTE does has to do with voting. In addition to supporting the activities of other civic organizations, MassVOTE engages in voter registration, voter mobilization and voter education activities directly.

155. MassVOTE conducts numerous voter mobilization efforts. It directly participates in door knocking campaigns to remind registered citizens to vote, conducts phone banking to do the same, and canvasses neighborhoods with "VOTE" door hangers the night before elections.

156. MassVOTE conducts numerous voter education efforts. It publishes candidate guides, organizes candidate and ballot question forums, participates on civic education panels, and distributes "Know Your Rights" cards to inform voters of their essential rights.

157. MassVOTE conducts numerous voter registration efforts. It regularly volunteers to register new citizens at naturalization ceremonies, conducts door-knocking campaigns, sets up voter registration tables at events throughout the year and participates in the National Voter Registration Day.

158. Cheryl Crawford, the Executive Director of MassVOTE, has assisted Massachusetts residents with registering to vote. MassVOTE's other employees and volunteers also assist Massachusetts residents with voter registration. After MassVOTE receives a voter registration, MassVOTE employees or volunteers enter information from the form into the VAN database. It does not take long to enter each voter registration form into the VAN system. After the pertinent information from the form is entered into VAN, MassVOTE employees and volunteers provide the completed form to the relevant city or town.

159. MassVOTE grants funds to other 501(c)(3) organizations in order to enable those organizations to conduct their own voter registration efforts. For example, MassVOTE provides grants to service-based organizations such as health centers and community centers to enable these organizations to conduct voter registration.

160. In MassVOTE's experience, face-to-face interactions are the most effective method to register individuals, and to educate and mobilize them.

161. In MassVOTE's experience, individuals on the street will allow only a limited amount of time to speak about voting.

167. Since 2014, MassVOTE has allocated resources to promoting National Voter Registration Day, the most recent of which occurred on September 16, 2016.

168. MassVOTE's participation in National Voter Registration Day includes hosting voter registration tables directly, helping grantees set up their own tables, producing fliers and notices, and coordinating with national and local partners.

169. MassVOTE spends approximately 30 to 40 hours per year on its National Voter Registration Day activities.

172. On the day of the voter registration deadline, MassVOTE stops all of its other activities to focus exclusively on voter registration.

173. Cheryl Crawford, Executive Director of MassVOTE, currently allocates approximately 25% of her time to voter registration efforts.

175. Although MassVOTE is a statewide organization, MassVOTE currently publishes candidate guides for only 1 to 2 cities every election cycle because of their limited resources.

177. MassVOTE participates in an initiative with the NAACP known as the B500 program. The premise of the program is to identify 500 super voters, who then work with other voters to encourage them to vote. The program has struggled because it lacks a dedicated campaign manager.



**B. DEFENDANTS**

*Secretary of the Commonwealth*

180. Defendant William Francis Galvin is the Secretary of the Commonwealth, and he is generally responsible for overseeing elections in Massachusetts.

181. The Secretary of the Commonwealth's Office includes an Elections Division. Michelle Tassinari is the Director and Legal Counsel of the Elections Division of the Secretary of the Commonwealth. Tassinari's responsibilities as Director include overseeing the Elections Division Office, which involves directing the division's staff. Tassinari reports to Massachusetts Secretary of the Commonwealth William Francis Galvin.

182. Tassinari's responsibilities as Legal Counsel include drafting comments on regulations and legislation; drafting and managing contracts; preparing memos for local election officials; taking phone calls; and responding to emails.

183. Within the Secretary of the Commonwealth's office, Tassinari is primarily responsible for voter registration policies and procedures, which includes drafting regulations that implement the Massachusetts General Laws applicable to voting.

184. The Secretary's Office prints, prepares, and ships ballots and envelopes to local election officials. The Office also provides local elections officials with an Election Day memorandum before each election.

*City of Somerville*

185. Defendant Nicholas P. Salerno is the Chairman of the Board of Election Commissioners for the City of Somerville.

186. The Board of Elections Commissioners oversees all the activities of Somerville's Election Department. It ensures that all appropriate policies are in place and all election laws are adhered to by Somerville.

187. Salerno is a full-time Election Commissioner. As Election Commissioner, Salerno is responsible for overseeing the election process, including voter registration, in Somerville.

188. The Election Department has four full-time employees: Salerno, a Deputy Election Commissioner, an Assistant Deputy Election Commissioner, and a Senior Clerk. In 2016, the Election Department also employed temporary part-time staff members.

189. All four permanent employees of the Election Department, including Salerno, were involved in voter registration efforts prior to the November 2016 election.

#### *City of Revere*

190. Diane R. Colella is the Election Commissioner for the City of Revere. She is responsible for all aspects of elections in the City of Revere. Her duties include running elections; registering voters; maintaining the annual City census; producing the new street list book; and maintaining an office staff and daily work flow.

191. The Election Commission is composed of the Election Commissioner, an Assistant Election Commissioner, a Junior Clerk, and 3 part-time Election Board members.

192. The Assistant Election Commissioner processes online voter registrations; orders supplies; pays bills; and works with constituents and others to satisfy requests for City services. The Junior Clerk also processes mail-in voter registrations.

#### *City of Chelsea*

194. Jeannette Cintron White is the City Clerk for the City of Chelsea, a position she assumed in October 2016. As City Clerk, her responsibilities include handling all aspects of elections in Chelsea.

195. Cintron White's department includes five staff members, all of whom report to Cintron White. The staff is responsible for entering voter registrations into the VRIS database; handling early voting, absentee ballots and provisional ballots; preparing and printing the voter lists; assisting in hiring poll workers; and testing the ballots.